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CONVEYANCER'S NOTEBOOK.

With this number we commence the third volume to be issued in this war. It has been inevitable, we think, that so much of the first two volumes should have been devoted to emergency legislation, most of which we hope to be of an ephemeral character. It is obvious that Parliament has not exhausted its reserves of such legislation, and we find ourselves having to deal in this number with yet another Act of great consequence in the Liabilities (War-Time Adjustment) Act, 1941. The need for dealing with such Acts as immediately as possible make attempts at a planned policy of articles extremely difficult. Even in a "total" war there is something to be said for maintaining in the law an appearance of normality and a sense of continuance. Law is the rock upon which any order of "peace and good government" must be built, and only by preserving this sense of continuance and stability can we maintain this tradition to its full extent.

Another difficulty which haunts the editorial chair arises from the fact that several of our contributors are away on national service. Others find the demands on their time made by working with depleted staffs or part-time national service render it increasingly difficult to devote time to what we may call their "literary activities". In these circumstances may we make a special appeal to any readers who feel an urge to write to let us have their contributions. If they have had to prepare drafts of instruments for which they could find no satisfactory precedent the General

Editor would be very glad to consider their publication. If they have had occasion to investigate a point of law that presents difficulty, an article might without a great deal of extra work afford additional remuneration for their labour. If any intending contributor has any doubt about the suitability of any topic for an article in this Journal, the Editor of the Journal would be happy to answer a letter addressed to him. At the same time, if any reader feels that there is some subject which ought to be dealt with in the Journal or a precedent ought to be available in our collection of precedents, we should be glad to hear from him. We can make no promises, particularly in the difficulties which now face us, but we can assure readers that any suggestions will receive our urgent attention and our best endeavours.

Trustees—war insurance.—Doubts having arisen concerning the power of trustees to insure under Part II of the War Damage Act, 1941 (voluntary insurance of private chattels), the Trustee (War Damage Insurance) Act, 1941, has been passed. A trustee has, and shall be deemed always to have had, power, if and so far as no contrary intention is expressed in any instrument creating the trust, to effect an insurance to the full value of the property. This power includes the right to apply capital money or securities subject to the same trusts as those affecting the goods insured, and pending the making of provision for such application, to apply the income of any property subject to these trusts. In neither case is it necessary to obtain the consent of any person entitled wholly or partly to such money, securities or property or to the income thereof.

The Act then contains a saving clause. It does not affect the right of the Board of Trade to refuse an application for a policy, nor does it affect any power vested in the trustee under the trust instrument or by law to effect the insurance otherwise than under the scheme of the War Damage Act, 1941, or against a risk other than war damage.

The Act is purely permissive. It does not compel the trustee to insure. Whether a trustee decides to exercise this power must clearly depend upon the character of the property, the interests to be protected, and the obligations of the particular trust.

Courts emergency powers—Mortgages and contracts made after the war.—No doubt the severe pressure on the time of Parliament and parliamentary draftsmen must result in the incorporation of sections strictly relative to other statutes in new Acts. The trouble of such a practice is that the practitioner, already harassed by the burden of emergency legislation, may overlook the odd section. We therefore take the opportunity of warning practitioners that the Liabilities (War-Time Adjustment) Act, 1941, contains two sections (26 and 27) which are really extensions of the Courts (Emergency Powers) Acts and the Possession of Mortgaged Land (Emergency Provisions) Act, 1939.

Section 26, which is to be construed with the earlier Acts and may be cited together as the Courts (Emergency Powers) Acts, 1939—1941, extends these Acts to any judgment or order of the Court for (a) the recovery of a debt under a contract made *after* the commencement of the principal Act; and (b) for recovery of land for non-payment of rent or for recovery of possession of land other than a dwelling-house by a mortgagee for default in payment of money where the lease or mortgage was made *after* the commencement of the principal Act; and (c) for the delivery of any property other than land by reason of a default under a contract made *after* the commencement of the principal Act. The purpose is to enable a defendant to get relief where he can satisfy the Court that his inability arises directly or indirectly from causes attributable to any war in which His Majesty may be engaged *and* the circumstances arose *after* the date of contract, lease or mortgage.

Under sub-section 2 of section 26 a person shall not be entitled without leave of the Court to exercise or take proceedings in the cases mentioned in section 1 (2) of the principal Act or proceed to execution, etc., for recovery of possession of a mortgaged dwelling-house for default in payment of the mortgage money in similar circumstances to those mentioned above.

Section 27 simply applies the Possession of Mortgaged Land Act by omitting the words "made before the 3rd September, 1939," from the principal Act. Sub-section 2 protects a mortgagee who has gone into possession prior to June 12, 1941, but enables the Court to rescind or vary an order given for possession.

We do not attempt in this place to analyse the effect of these sections, but they are of such importance that we feel it better to draw attention to them.

Registered land—Land or charge certificates destroyed by enemy action.—The Land Registry has issued Practice Leaflet No. 3 (H.M. Stationery Office, price 1d.), dealing with destruction of land or charge certificates by enemy action.

The steps advised by the Registry in the event of loss or destruction are as follows : *First*, application should be made *at once* for an office copy of the register and of the plan (normal fee 1s. 6d. and 2s. respectively). No special form is required in making this application, but of course the application should be headed by the title number if that is available. If the title number is not known, no procedure is mentioned in the pamphlet, but of course it could be discovered by an official search of the index map and parcels index, which can be done through the post (for form see K. & E., III, p. 570). It is important to apply at once to avoid the possibility that the register itself may be destroyed by the same cause, namely, enemy action. An office copy is admissible in evidence to the same extent as the register itself : Land Registration Act, 1925, s. 113.

Secondly, application can be made at convenience for the issue of a new land or charge certificate under L. R. R. 271. There is no prescribed form, but the application must be supported by statutory declaration, which, however, requires no Inland Revenue stamp : forms of application and statutory declaration will be found K. & E., III, pp. 583, 584, but clause 2 of Form XXIX should read : "The Land [Charge] Certificate was deposited in [*place of deposit*] and was destroyed or lost by enemy action on the —— day of —— [*or as the case may be*]." This application will then be considered and any additional evidence required will be demanded. The pamphlet indicates that the new land certificate will be issued in the shortest possible time, but it is apparent that there must be some delay, and hence the importance of immediate application for an office copy.

The office copy does not replace the necessity for a land certificate, because it is not effective to enable dispositions to be carried through the Registry, where the land certificate is required to be deposited. In fact, most dispositions, including transfers, leases and charges, require the deposit of the land certificate at the Registry, because, among other reasons, a land certificate may be deposited by way of charge equivalent to a deposit of title deeds. Consequently, application for a new land certificate should be made with as little delay as possible, since it may take a little time before it is actually issued.

We ought to explain that as many of our subscribers are also subscribers to *Key & Elphinstone's Precedents*, and as the publishers of that work have been approached for a Noter-Up to these volumes, we have decided as far as reasonably possible to add to our notes of cases references to appropriate pages in *Key & Elphinstone* (14th ed.).

THE LANDLORD AND TENANT (WAR DAMAGE) (AMENDMENT) ACT, 1941.

By P. H. Thorold Rogers, Barrister-at-Law.

In the early days of the present war the author was bold enough to contribute to *The Conveyancer* an article entitled "Some Anomalies of the Landlord and Tenant (War Damage) Act, 1939", in which he ventured to attempt to foretell the difficulties to which that Act would give rise in practice. In a few instances time has proved him right, but in many others it has shown that as a result of the diversity of human affairs, many other anomalies, equally unforeseen by the author and by the framers of the Act, have given rise to much greater inconvenience and injustice.

When the 1939 Act (which will henceforth be referred to as "the principal Act" in contrast to the 1941 Act, which will be called the "Amendment Act") was passed there were no provisions for the payment of compensation to the owners of property which suffered war damage. The principal Act was drawn accordingly, enabling the tenant of damaged land to disclaim his lease or to retain it rent free but at the cost of undertaking to do the necessary repairs after the completion of which rent once more became payable.

Though lucidity itself when contrasted with much of the "emergency legislation", the principal Act is by no means easy of comprehension and the machinery it prescribes is both complicated and confusing. To those who had not the sense or the depth of pocket to take competent advice it afforded no real protection at all, for there was no substantial chance of their ever being able to take advantage of it. In the result, when the tenant of a house or other property found that it had been rendered unfit by war damage he almost always (unless he had money and was

well advised) left the property and moved elsewhere, often under the somewhat pathetic belief that as it was not reasonable that he should pay rent in such circumstances the law would see to it that he was duly relieved. Unfortunately the law did nothing of the kind and tenants who did not serve a notice of disclaimer or of retention remained fully liable for rent notwithstanding the total destruction of the demised property.

But the hardships were not all upon the side of the tenant; the landlord also often found himself unjustly penalised. In the first place the Act afforded no means by which he might test the question whether he had rendered the land fit and could once more demand rent. To raise this point he had to bring an action for rent in the ordinary way, leaving it to the tenant to raise the issue of unfitness as a defence if he saw fit. In the second place the landlords of properties rented at comparatively low rentals were faced with a growing number of tenants who left their properties and disappeared; yet there was no satisfactory procedure by which the landlord might re-enter into possession in such cases and he was often forced to sit by whilst the property lay idle.

These and a number of other defects in the principal Act have now been remedied. To the author, perhaps presumptuously, it seems that there remain a number of other points which should have received attention at the same time; and it is feared that the Amendment Act is not itself without an unfortunate error or omission in one or two places.

Short tenancies.

The first section of the Amendment Act prescribes an entirely new code for short tenancies in an attempt to cater justly for those persons whose lack of intelligence and wealth disables them from taking full advantage of the principal Act.

A " short tenancy " is defined as:—

> " any tenancy or sub-tenancy which the tenant is entitled to determine at any time by a notice expiring not later than the end of the next complete quarter or the next complete period of three months of the tenancy, and in a case where the tenant is holding over any land, which he previously held under a short tenancy, by virtue of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, the Courts (Emergency Powers) Acts, 1939 to 1941, or the Liabilities (War-Time Adjustment) Act, 1941, he shall be deemed to be holding the land under a short tenancy ".

There are several points of interest about this definition. It is believed to be the first occasion on which the analogy of the

statutory tenancy created by the Rent Restrictions Acts has been extended to any other protected interest, and it is not altogether clear what those other interests are. It can seldom be accurate to speak of a tenant holding over under the Courts (Emergency Powers) Acts, 1939 to 1941, for those Acts do not enable a tenant to hold over after the determination of his tenancy. The only occasion on which a tenant can successfully resist under those Acts an application by his landlord for possession on the ground of the determination of the lease is when that determination is the result of a forfeiture arising out of the non-payment of rent. In such cases under the principal Act the lease was forfeited, and if the landlord was refused leave to proceed the tenant did hold over; but under the Courts (Emergency Powers) (Amendment) Act, 1940, s. 1, no forfeiture is to take place until the landlord has leave to proceed, and in cases where forfeiture had already taken place the tenant was empowered to apply to the Court to revive his lease. It seems, therefore, that the only occasion upon which a tenant can be said to hold over under these Acts is when he is still in possession after a forfeiture for non-payment of rent which occurred before July 10, 1940, and in respect of which no order of reviver has been made.

Another point of interest arising out of the definition of short tenancy is due to the fact that the Rent Acts as now extended by the Rent Restrictions Act, 1939, cover a very large number of cases; but not all statutory tenancies will be short tenancies for the purposes of this definition. It is necessary not only that they should now be protected by one of the series of statutes referred to but also that they should originally have been short tenancies before the statutory protection accrued. In this connection the length of the term will be immaterial provided that it was determinable at any time by a quarterly or three-monthly notice (or any shorter period).

No notices under the principal Act can be served in respect of a short tenancy and if they are so served they will be of no legal effect and can be disregarded, unless there is doubt whether or not the tenancy is a short tenancy. (This is discussed below.) A tenant under such a tenancy cannot disclaim nor can the landlord serve upon him a notice to elect.

In place of all the complicated and now superseded machinery of the principal Act there is now a simple provision:—

> "Where for any period any land let on a short tenancy is unfit by reason of war damage and is not occupied either in whole or in part by the tenant, no rent shall be payable under the tenancy in respect of that period" (section 1 (2)).

With this may be read section 1 (3), which provides that where there has been partial occupation of war-damaged land the rent shall be apportioned by the Court unless the parties can agree it.

This means that whilst the tenant under a short tenancy is protected against an unjust liability for rent he is not faced with the alternative of undertaking the repairs or sacrificing his rights to return to occupation when the property is once again rendered fit. Should he wish to determine his tenancy he can of course do so just as if no war damage had occurred whether it is a contractual or a statutory tenancy, and we shall see that the same result will probably follow if he neglects to return after the damage has been made good.

But there are weak points in the section as well. Its provisions will only come into effect if the land is unfit by reason of war damage. The definition of unfit is to be found in section 24 of the principal Act in phraseology which has been the subject of endless discussion, but the exact meaning of which still remains wrapped in mystery. It is clear, however, that regard must be had to the use to which the property is put and that if it is in fact unfit for that use the insignificance of the amount necessary to put it into repair is immaterial (*a*). It is also clear that the property must be viewed as a whole and that damage to part, although it may substantially reduce the value of the whole, will not necessarily render the whole unfit. The importance of this will be better appreciated when it is realised that there is no provision in the Amendment Act or elsewhere for an apportionment of the rent where there has been some damage but the land is still fit (*b*).

As soon as the property is once more rendered fit (whether by the landlord or by a local authority under the Housing (Repair of War Damage) Act, 1939, as amended by the Repair of War Damage Act, 1941) liability for rent will accrue again whether or not the tenant returns to possession. He will also be liable if he remains in occupation whilst the land is unfit, though if his occupation is partial only the liability will be apportioned (s. 1 (3)) (*c*).

In the case of dwellinghouses a simple method has been provided of determining whether they have been rendered fit. The certificate

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(*a*) *Hildebrand* v. *Lewis*, [1941] 2 All E. R. 584.

(*b*) At first sight it might be thought that this result was achieved by s. 1 (3), but on closer examination it will be seen that that sub-section has no application except where " the land is unfit by reason of war damage ".

(*c*) Occupation in this connection is not to be strictly construed, and whilst the presence of a sub-tenant is the occupation of his sub-lessor the mere presence of furniture, the retention of the keys or occasional visits to remove or preserve the furniture are not to be regarded as occupation (s. 1 (8)).

of a local authority (which may be given by their duly authorised officer) is to be presumptive evidence that this has been done (s. 1 (5)) (*d*).

Either the landlord or tenant may apply for such a certificate, but neither can compel the local authority to inspect the property or to grant a certificate of fitness. It is most important to realise that such a certificate is of no evidential value at all on the initial issue of war damage. A tenant who desires to defend an action for rent by alleging the unfitness of the property must prove its condition in the ordinary way. The certificate of a local authority can only be used when the issue is whether land, which it has been shown was rendered unfit, has since been rendered fit. This omission is going to be a formidable weapon in the hands of grasping landlords. The Act contains no specific direction as to the onus of proof and it would seem to be the inevitable construction of section 1 (2) that the tenant who asserts the unfitness of the property will be required to prove this affirmatively. It is true that by section 1 (7) either party is enabled to apply to the Court to determine whether land let on a short tenancy was at any time unfit, but if the tenant makes such an application it is difficult to see how it could be suggested that the onus of establishing the unfitness did not rest upon him. Where the landlord applies under this sub-section the position is not so clear and no guidance can be obtained from the Act; in the opinion of the author the proper rule is to lay the onus of proof upon that party who is endeavouring to establish that the condition of the property has been changed.

Further complications are foreseen as a result of a variation in the definition of "unfit". That used in the principal Act (section 24) has been much discussed but not yet satisfactorily interpreted (*e*).

For the purposes of section 1 the new definition is as follows: "a dwelling-house let on a short tenancy which has been rendered unfit by war damage shall be deemed to be fit if it has been repaired to such extent as is reasonably practicable at that time, having regard to the circumstances prevailing in the locality, and as is sufficient to render the dwelling-house reasonably capable of being used for housing purposes, and continues to be in that state of repair; provided that if a dwelling-house is deemed to be fit by virtue of this subsection, but the extent of the accommodation therein has been substantially diminished . . . the rent payable

(*d*) The certificate will not need to be proved, but if purporting to be in order will be deemed to be duly issued, unless the contrary is proved (s. 1 (5)).

(*e*) It was considered in *Boudou* v. *Thornton-Smith*, [1941] 1 All E. R. 454.

. . . shall be reduced to such extent as may be agreed . . . or . . . fixed by the court" (*f*).

Under the principal Act it was thought to be clear that in judging of unfitness regard must be had to the property as a whole; but in applying the new definition to dwelling-houses this cannot be entirely correct, for the proviso expressly contemplates a substantial diminution in the accommodation and such a diminution would, surely, render the property as a whole unfit for the purpose for which it was adapted or used before the damage? That the test is likely to be a variable one is recognised in section 1 (5). This requires the local authority to carry out a second inspection at the request of the tenant if it is suggested that further repairs have since become reasonably practicable or that repairs already carried out have not been maintained in a reasonably efficient state. The tenant may insist on any number of such inspections, provided always that he allows a period of at least three months to elapse between the last inspection and his new demand. If the local authority accept his contention they *must* revoke their certificate of fitness and their new certificate will be presumptive evidence that the property was in fact unfit, from which will follow a suspension of rent under section 1 (2) unless the landlord can rebut the presumption. It will be observed that the authority have no power to issue a certificate that the property has *not* been rendered fit in the first place; there is, therefore, no need for any provision to entitle the landlord to apply for a revision. It is an interesting and difficult question whether a tenant can give in evidence the fact that a local authority has refused a certificate of fitness after being requested to inspect the property (*g*).

It has already been remarked that either landlord or tenant may at any time apply to the Court in respect of a short tenancy to determine whether the land is or was at any time unfit. This right of application is not confined to the one issue, but extends to "any other question arising under this section in relation" to a short tenancy. Of the probable questions it is thought that one of the most frequent will be whether or not the land is let upon a short tenancy as defined in this Act. Where this point is in doubt

(*f*) The material parts of the definition in the principal Act are as follows:—
"'unfit' means . . . unfit for the purpose for which those buildings . . . were used or adapted for use immediately before the occurrence of the war damage in question, having regard to the class of tenant likely to occupy similar buildings . . . which are not unfit for that purpose, to the standard of accommodation available at the material time, and to all other circumstances."

(*g*) As such a request may be given by landlord or tenant it would be of great advantage to a tenant to be able to rely upon the authorities' refusal as evidence of unfitness to support a defence under sub-s. (2).

it will behove both landlord and tenant to walk warily. From the tenant's point of view it will be unwise to rely solely upon the Amendment Act, for should it be held that the tenancy is not a short tenancy he will be held liable for rent throughout the period up to the decision and will only be able to determine this liability for the future by serving a notice of disclaimer under the principal Act (*h*). If a notice to elect is served upon him and he does not serve notice of disclaimer within one month (*i*) he will be held to have elected to retain and thereby to have assumed very heavy responsibilities of repair.

To the landlord also uncertainty as to whether or not a tenancy is a short tenancy will be important. On the one hand he may be able to force the tenant's hand by serving a notice to elect with the effect just described and he may also be able to claim rent during the interim; but on the other he must remember to reply to a notice of disclaimer (if he wishes to serve notice to avoid disclaimer) within the allotted time of one month, or he will have lost his only opportunity of doing so. So long, then, as there remains any doubt whatsoever as to whether a given tenancy is a short tenancy, the tenant will always be well advised to consider the possible alternative that it is not, and to act accordingly under the principal Act. The landlord also should consider his position, but it may pay him better to hold his hand unless a notice of disclaimer is served. Both parties should always bear in mind that it will be dangerous to rely solely upon the special protection given to short tenancies except in those cases where there can be no doubt that it is applicable.

It may here be remarked that where a notice had been served under the principal Act before August 7, 1941, in respect of a short tenancy the principal Act will continue to apply unless the notice was for any reason "of no effect" (*k*). The issues thus raised appear to be within the provisions of sub-section (7), which enables either party to apply to the Court for a ruling.

There remains for discussion one further important modification of the law applicable to short tenancies.

In his article on the principal Act the author drew attention to the difficulties facing the landlord whose tenant adopted a purely

(*h*) A notice of retention will have the same temporary result, but, of course, makes him liable to repair the damage.

(*i*) S. 5 of the principal Act. The time can be extended in some circumstances, but none of them are relevant here.

(*k*) A notice is of no effect under the principal Act if land was not unfit or the lease was an agricultural or mining lease. A notice in respect of a ground lease was also of no effect, but the Amendment Act, s. 10, now provides that such a notice already served shall not be deemed to be of no effect unless the Court had already so determined.

negative attitude. He might, of course, wait until rent was in arrear and then sue for it; but there was never any prospect of getting leave to proceed if the property had sustained war damage. If, on the other hand, he served a notice to elect, to which the tenant did not reply (and in the case of poorer properties this was what would almost invariably happen) the tenant was presumed to have elected to retain. The landlord could then do nothing until a reasonable time had elapsed in which the tenant might have executed the repairs, and at the end of that time he could only recover possession on the ground of forfeiture for breach of covenant (for a covenant to repair was implied by virtue of the notice of retention) (*l*) or for non-payment of rent. In the case of controlled tenancies he had also to contend with the Rent Restrictions Acts.

Some assistance is now offered to the harassed landlord in this respect. If he can satisfy the Court that he has rendered the land fit and can show also

> " (i) that a period of not less than three months has elapsed since the land was rendered fit and during the whole of that period the tenant has not been in occupation of the land either in whole or in part and has not paid any rent in respect of that period or any part thereof, and
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> (ii) that he has made all reasonable efforts to communicate with the tenant and has failed to do so;

the Court may determine the tenancy and give possession, either immediately and unconditionally, or on terms."

The first difficulty here envisaged is the possibility of a small payment of rent being made or a short occupation enjoyed after the war damage followed by the disappearance of the tenant. Although the wording is not entirely clear it is thought that *any* continuous period of three months after the war damage will suffice notwithstanding that the tenant's departure did not take place until some time after that damage. The payment of rent in advance raises no problems, for it must be apportioned and any sum paid in respect of a period whilst the land was unfit must be repaid under section 13; but it seems rather unreasonable that the landlord who is able to communicate with his tenant, but who finds him wholly unresponsive and unhelpful, should be deprived of this useful procedure and left to his clumsy and dilatory alternative remedies (*m*).

(*l*) But such a covenant would not carry a right to forfeiture unless a forfeiture clause were contained in the agreement.

(*m*) Of these the Small Tenements Recovery Act, 1838, often offers a possible solution.

Conditional notices of retention.

The most important of the amendments to the principal Act effected by the Amendment Act, after those in connection with short tenancies which have already been discussed, is without doubt the introduction of yet another form of notice to be served by a tenant upon his landlord. It will be remembered that the choice under the principal Act lay between inaction, a notice of retention and a notice of disclaimer. Whilst to serve the last meant the final determination of the lease (unless the landlord chose to continue it by assuming liability to repair) the service of the former imposed upon the tenant the serious obligation of rendering the land fit.

Before determining which of these courses to follow a tenant will usually desire to know the form which the compensation payable under the War Damage Act, 1941, will take. There are two main types of compensation under that Act—a value payment equivalent to the value of the property in March, 1939 (less any residual value to-day) and a cost of works payment, which will be the actual cost of repairing the damage; and whereas a value payment will usually be distributed amongst the owners of the proprietary interests in the property at the time of the damage, a cost of works payment will be paid to the person who carries out the repairs. If, then, a cost of works payment is going to be made, the tenant will often desire to maintain his lease in existence, whereas if the compensation is to take the form of a value payment he will be heavily out of pocket should he serve a notice of retention. He cannot, however, wait until the Commission's decision is announced, because rent will be accruing all the time until he serves a notice of retention or of disclaimer under the principal Act. The purpose of the Amendment Act is to enable him to keep alive his right of election until this decision has been announced and he knows what form the compensation payment will take.

It may also sometimes be important for a landlord to have the same information before deciding whether to serve a notice to avoid disclaimer in answer to a notice of disclaimer served by his tenant, but for some reason which is not clear to the author nothing has been done to assist him in this respect and he must still reply, if at all, to a notice of disclaimer within the period (usually one month) prescribed by the principal Act. There is no such thing as a conditional notice to avoid disclaimer.

The new notice which a tenant may now serve is called a conditional notice of retention. It is an alternative to the earlier notices, either of which may still be served. Before considering its nature and effect it should be observed that a notice of retention may be turned into a conditional notice in three ways:—

(a) If the notice is expressed to be conditional when it is served it will so take effect (section 1 (2));

(b) Even though an unconditional notice has been served (whether before or after the passing of the Amendment Act) the Court may, on the application of the tenant, convert it into a conditional notice (section 6 (2)) (*n*);

(c) An unconditional notice, if served before the passing of the Amendment Act (August 7, 1941), may be converted into a conditional notice by the service upon the landlord, within three months of that date, of a notice to the same effect as a conditional notice (*o*).

Tenants who have neglected to reply to a notice to elect and have in consequence been deemed to have served a notice of retention should note that they can now convert it into a conditional notice in this manner.

In all cases except (b) the tenant should serve upon the landlord a notice of retention in the form in use under the principal Act to which is added a statement that it "is conditional and will be treated as a notice of disclaimer if the War Damage Commission determine to make a value payment under Part I of the War Damage Act, 1941, in respect of the war damage" (section 2 (1)) (*p*).

Until the Commission announce their decision the tenant's liabilities will be partially suspended. There will not be a total suspension, for the tenant will still be liable to "execute all such works as are reasonably practicable for temporarily meeting the circumstances created by the damage"; he must also do anything necessary to assist them to reach a decision and take such steps as are practicable to ensure that the necessary works will be executed without delay if a cost of works payment is announced (*q*).

Except to this extent the obligation laid upon a tenant who serves a notice of retention will be suspended, but he will get the benefits of the notice and no rent will be payable (section 2 (8)). When the Commission's decision is announced the tenant will not be able to make his choice: the consequences will be automatic. If

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(*n*) This power appears only to be exercisable where (i) a value payment has been announced, (ii) it is not practicable to render the land fit, and (iii) the tenant has been unable to secure the landlord's approval to proposals for an alternative scheme of reconstruction (see s. 6 (1) and (2)).

(*o*) A copy of the notice must be served upon the Commission within one month, otherwise it will have no effect (s. 2 (7)).

(*p*) A copy of this notice *must* be served upon the Commission within one month and the whole notice may be invalidated if this is not done; service may be effected by prepaid registered post addressed to the Commission at any of their addresses (s. 8 (4)).

(*q*) Due regard will, of course, have to be had to the restrictions upon new buildings and repair work.

the award is of a value payment the notice will take effect as a notice of disclaimer as from the date upon which the Commission's decision became final (section 2 (2)) (*r*).

The tenant must give notice of this within fourteen days to his landlord, but it is thought that failure to do so will not affect the operation of the section, though it may render the tenant liable in damages (section 2 (3)). The disclaimer is expressed to commence from the date on which the decision became final—a form of words which leaves it very doubtful whether the tenant will not be liable for rent in respect of the period up to that time. It is suggested, however, though with diffidence, that this injustice may be avoided by reliance upon sub-section (8), which enacts that, subject to the express provisions of the section, the conditional notice shall operate as an unconditional notice under the principal Act. One effect of such a notice is to suspend liability for rent immediately.

In all other cases, that is to say, in all cases in which a value payment is not announced,—including, it seems, the not impossible case in which for some reason no award at all is made by the Commission—a conditional notice of retention will take effect for all purposes as if it were an unconditional notice under the principal Act.

Ground and multiple leases.

Both these types of lease, as defined in the principal Act, s. 24, were subject to special rules. In the case of ground leases in particular these rules were found to be very inconvenient and, quite apart from that, there were constant disputes as to whether a lease was or was not a ground lease.

So far as ground leases are concerned the distinctions are abolished and they are subjected to all the provisions of the principal Act just like any other lease. This change is effected by section 10 of the Amendment Act, which revokes sections 13 and 14 of the principal Act. Some provision had to be made for those cases in which there were proceedings pending or in which notices under the principal Act had been served. Although such notices would have been deemed to be of no effect under that Act unless served with the consent of the Court they are now to be considered to be valid and effective unless the Court has actually decided that they were of no effect or the parties had so agreed (expressly or by

(*r*) This is not the date on which the decision was reached or announced, but a later date fixed by s. 8 (2). Where there is no appeal it will be the date on which the right of appeal expired and where an appeal is brought it will be the date on which it is determined or abandoned (s. 8 (2)).

implication), and even in the last two cases the decision or agreement is to be without prejudice to the serving of a new notice (section 10 (3)). It might at first sight be thought that retrospectively to validate these notices would lead to disastrous injustice if the time for replying to them were not also automatically extended; but in fact there is no need for any such provision since, unless they were objected to within the time allotted for replying, the lease was conclusively presumed not to be a ground lease and the notices were accordingly validated by section 14 of the principal Act. Any pending proceedings under section 13 or section 14 are to be discontinued on terms thought by the Court to be just, and in the result the only occasion in which the old law will be of importance will be where an actual order has been made by the Court under section 13 or section 14, for the above amendments are to be without prejudice to the effect of any such orders.

Section 15 of the principal Act, which dealt with multiple leases, has been redrafted. The initial procedure in the case of a multiple lease will now be precisely the same as in any other lease, but any interested person (including the person serving the notice himself) may apply to the Court to determine whether retention or disclaimer of the whole or of part of the property comprised in the lease should be permitted, and the Court is given comprehensive powers to deal with all possible situations in making such orders.

Modifications of liability to repair or render fit.

(i) *After cost of works payment.*

It will be remembered that under the principal Act any common law or statutory obligation to repair war damage is annulled, but that a tenant may make himself liable to render land fit by serving a notice of retention and a landlord by serving a notice to avoid disclaimer.

Under the War Damage Act, 1941, where a cost of works payment is made it will be paid to the person who actually makes himself liable for or discharges the cost of the repairs. The Amendment Act, therefore, contains provisions designed to adjust the position of landlord and tenant to this new state of affairs. These provisions may be briefly summarised as follows.

Where a cost of works payment is made and either the landlord or the tenant is liable to render the land fit under the principal Act his liability shall be construed as a liability "to reinstate as soon as is reasonably practicable the land in the form in which it existed immediately before the occurrence of the war damage, subject to any requirements imposed by the Commission as to the nature of the works, the materials used therefor, or otherwise"

(section 5 (1)) (*s*). Disputes are to be referred to the Commission and either party may always apply for a modification of the works (section 8 (2) and (3)).

It may well be that no notices have been served. Where this is so any common law or statutory obligation to repair will be revived so as to have the same effect as an obligation to render fit (section 5 (4)). This is going to revive once more all the old law surrounding *Paradyne* v. *Jane* (1647), Alleyn 26, which one had hoped was buried for ever: but there may still be many cases where there is no obligation under any notice or any covenant or statute, and for these no provision is made at all.

(ii) *After value payment.*

So far we have considered the position where a cost of works payment is made. When the compensation takes the form of a value payment it may nevertheless happen that the tenant retains the lease, perhaps because he has intentionally served an unconditional notice of retention or possibly because he has not complied with the provisions of this Act. Section 6 will enable him to meet his liabilities in the most sensible manner, but it should be carefully noted that it only applies where a value payment is made. Such a payment will normally be made to the owners of the proprietary interests in the land, but the tenant can secure payment to himself if he puts forward reasonable proposals for the reconstruction of the land and either obtains the consent of the other interested persons or persuades the Commission that his proposals are reasonable (section 6 (1)). Sub-section (2) of the same section enables the Commission to convert an unconditional notice of retention into a conditional notice—a power which has already been discussed.

(iii) *Consequential amendments.*

A general power to modify the terms of a lease where the effect of a reconstruction makes this necessary will be found in section 7, and in section 14 the Amendment Act remedies a serious omission of the principal Act. Under the latter a landlord who had attempted to repair war damage could not apply to the Court to determine whether he had rendered the land fit. He could only raise this issue by suing for rent and leaving it to the tenant to raise this point as a defence. Now, however, either party may apply when repairs have been carried out after the occurrence of war damage for the determination of the county court as to whether or not those repairs have rendered the land fit, and if so, on what date.

(*s*) There follows a proviso which excepts work which does not enhance the value of the land.

War damage.

The definition of war damage in the principal Act has been revoked and replaced as from August 7, 1941, by that contained in the War Damage Act, 1941, s. 80. This is considerably narrower than its predecessor, but it is too long and the difficulties it raises are too many to make it possible to do more here than draw attention to its restrictive nature.

Miscellaneous amendments.

Three minor amendments remain to call for attention. Rent paid or payable in advance is now to be apportionable in all cases under both Acts. The decisions upon the wording of the principal Act will therefore cease to be of importance save for the fact that on first principles of construction they will continue to apply in all cases where a notice had been served before August 7, 1941, the date of the Amendment Act.

The definition of "landlord" is to include a mortgagee in possession by himself or a receiver (section 17 (3)). It has recently been decided that it does not include a superior landlord who has served notice under the Law of Distress (Amendment) Act, 1908, s. 6.

Lastly, where in the course of repairing war damage repairs of other damage (not being ordinary wear and tear) are carried out anyone who would have been liable but for the war damage to perform or pay for those repairs will now be liable to indemnify the person who carries them out against so much of the cost of repairing the whole as is attributable to those particular works (section 15).

Insurance against war damage.

Other writers besides the author have drawn attention in *The Conveyancer* to the uncertain state of the law on the validity of a covenant to insure against war risks. In *Moorgate Estates, Ltd.* v. *Trower*, [1940] W. N. 18, the Court had to consider the validity of such a covenant and the effect of a breach of it, but the decision is robbed of much of its interest by the fact that at the material date (early in 1939) it was still—theoretically, at least—possible to obtain cover against war risks. When once it became a commercial impossibility to obtain such insurance there was much to be said for the view that any covenant to do so was frustrated; but no such argument could be advanced where, as was occasionally the case, parties were foolish enough to include such a covenant after its fulfilment had become impossible.

Even more troublesome was the proper interpretation of covenants expressed in general terms to insure against fire. Two decisions of the war of 1914–1918—*Enladye* v. *Roberts*, [1917] 1 Ch. 109, and *Upjohn* v. *Hitchens*, [1918] 34 T. L. R. 78—appeared to conflict, but not with sufficient certainty to enable one to say that the latter—a decision of the Court of Appeal—had definitely overruled the former.

Section 11 of the Amendment Act endeavours to solve all these difficulties by enacting that no covenant to insure land shall extend to the insurance of war risks whether it is expressly so stated or whether its application to war risks arises only by implication (*t*). But despite its good intentions there is one serious and almost vital flaw in its draftsmanship. In referring to " an obligation to insure land against war damage " its effect is confined to the somewhat narrow definition of " war damage " which is now lifted from section 80 of the War Damage Act, 1941, and substituted for that originally contained in the principal Act (section 24) by the Amendment Act, section 17 (2). This definition has been deliberately drafted so as to be less wide in its scope than the earlier one, and in the result there may well be many heads of damage which although a " war risk " are not technically " war damage ". We are, therefore, faced with the fact that any obligation to insure against war damage (whether it arises expressly or by implication) is avoided by section 11 only in so far as it applies to such damage as is covered by the definition; if there are risks within the scope of the covenant which are not within the definition it would seem that the respective rights and liabilities of the parties must remain unaltered, in which case the proper interpretation of the decision in *Moorgate Estates* v. *Trower* and the decisions of the last war may be of great importance.

WAR DAMAGE CONTRIBUTIONS AND APPORTIONMENT.

By E. O. Walford, LL.D., Solicitor.

The Legislature, whilst accepting the principle that compensation for war damage must be dealt with on a national basis, and not left to mutual insurance societies, has nevertheless found it necessary or expedient to impose upon owners of land and buildings a

(*t*) The section also enables the Court to reopen any transaction or judgment turning upon such a covenant and to grant relief.

species of war damage tax, or levy. It resembles a capital levy more closely than a tax; for it is a single contribution, though payable by instalments. The scheme, as readers will no doubt be aware, is on the footing that payments will be made by the War Damage Commission in accordance with Part I of the War Damage Act, 1941, in respect of war damage to land (including buildings) occurring during the risk period, *i.e.*, the period from September 3, 1939, to August 31, 1941.

Contributions towards the expense of making payments under the Act in respect of war damage are to be made at the rates and in the manner specified in the Act : section 18.

In the normal case the amount on which the contribution is to be calculated is the amount of the net Schedule A assessment on the first day during the risk period on which a Schedule A assessment in respect of the property in question was in force : section 19.

It appears that in respect of partially constructed property (not being assessed to Schedule A tax and not being valued for rating purposes) no contribution is payable, though it would seem that compensation will be payable in respect of war damage occurring to such structures, as they appear to fall within the term "hereditaments" (see section 2) in respect of which the War Damage Commission are to make payments.

There is to be only one contribution, but it is to be paid by five annual instalments which will normally be at the rate of two shillings in the pound of the net Schedule A assessment, although in the case of agricultural land and certain other special classes of property the rate is to be sixpence instead of two shillings. Those instalments are payable on July 1, 1941, and on July 1 in each of the four succeeding years : section 20.

Increase or Reduction of Receipts.

By section 22 the Treasury with the approval of a resolution of the House of Commons may increase the contribution by

(1) increasing the number of the instalments;

(2) increasing the proportion which each remaining instalment is to bear to the contributory value; or

(3) increasing both that number and proportion.

Such increase may be made if, on an estimate by the Treasury of the expected net receipts and payments under Part I of the Act, it appears that the expected net receipts are less than half the expected payments to be made by way of compensation : section 22 (1) and (2).

If on such estimate the expected net receipts exceed the expected payments provision is to be made for the reduction of the receipts as Parliament may determine.

Who Pays Contribution.

Owners of proprietary interests in property are to pay the instalments of contribution : section 23. But as there may be several different proprietary interests in any given property it was necessary to state in the Act from whom the instalments could be collected, and what proportions of those instalments could be collected from the other owners of proprietary interests.

Putting the position broadly, the scheme laid down by the Act is as follows :—

(1) The owner of the fee simple and every lessee or underlessee whose original term was upwards of seven years and in whom that lease is vested on January 1 in the relevant year, commencing with the year 1941, are deemed to have "proprietary interests" : section 95 (1).

(2) The instalment which is payable in any given year is to be paid by the freeholder if he is the only owner of a proprietary interest in the property. Otherwise it is to be paid by that one of the owners of the proprietary interests who on January 1 (in the year in which the instalment is payable) is as against the other owners of proprietary interests entitled to possession of the whole property : section 23 (1) (b). Thus, if A is freeholder and B holds from A a lease for a term of twenty-one years, and B has not granted a sub-lease of the whole property for more than seven years (or a sub-lease for seven years with a right of renewal, which would rank as a lease for more than seven years), B will be the person liable to pay the instalments in each year (commencing January 1, 1941) so long as the term is vested in him on January 1 of that year, even if he parts with the term on January 2 of that year.

Though B is liable to pay the instalments of contribution he will be entitled to reimbursement, to the extent indicated by section 24 and the Fourth Schedule to the Act, from his landlord if the lease has less than 100 years to run. As to the net liability of B as "direct contributor" this may be still further reduced if the property is mortgaged; for under certain circumstances the mortgagee will be liable to indemnify the direct contributor, B, to the extent indicated in section 25 of the Act.

If on January 1 in any of the years during which instalments of contribution become payable a contributory property is in the possession of a mortgagee or a receiver has been appointed and is in receipt of the rents and profits, the mortgagee will be liable to

pay the instalment and will be entitled to the like rights of indemnity as the mortgagor would have been entitled to if the instalment had been payable by him : section 27.

Once the liability for payment attaches to the owner (or mortgagee) of the appropriate proprietary interest, that liability cannot be shifted by contract, death or by any dealing with the property : section 35. Although A, the person liable to pay the instalment by virtue of the interest owned by him on January 1, 1941, had disposed of his whole interest to B before July 1, 1941 (the due date for payment of the first instalment), A would nevertheless remain liable to the Commissioners of Inland Revenue for the payment of the first instalment. In every case the appropriate "owner" (or mortgagee) on January 1 in each year is the party liable to pay the instalment for that year.

By section 82 of the Act it is declared that contributions made and indemnities given under Part I of the Act are to be treated for all purposes as outgoings of a capital nature. The object of this provision *may* have been solely to make it clear that no payment in respect of the instalments or indemnities can be deducted from income for taxation purposes.

ARE CONTRIBUTIONS APPORTIONABLE?

We now have before us the necessary material for the consideration of the question whether contributions or instalments are apportionable between vendor and purchaser, and if so when? There is also the question whether indemnity payments are apportionable.

LANDLORD AND TENANT.

Before considering the position between vendor and purchaser we may usefully dispose of the position between landlord and tenant and between the trustees (or the reversioner) and tenant for life.

Where rights of indemnity are conferred by the Act the indemnity amounts are recoverable "notwithstanding any agreement to the contrary, whether made before or after the instalment became due" : section 34. Hence even if a tenant *having a "proprietary interest"* has agreed to pay "all rates, taxes and *outgoings*" he will be in precisely the same position as if he had entered into no such covenant (so far as concerns liability to pay the instalments or to indemnify the landlord against payment). Similarly if such a tenant is paying an inclusive rent, and the landlord has agreed to pay all rates, taxes and outgoings, the Act will govern the position and the covenant will have no effect in relation to the instalments.

No doubt in both of these two cases the position can be adjusted in relation to future leases by a suitable provision in the lease. Thus if the lease is for, say, fourteen years and the tenant is to bear the whole of the instalments payable in 1942, 1943 and 1944 the rent may be reserved at, say, a quarterly rate and the rent payable in respect of each quarter from June to September can be stated as " such an amount as after deduction of an amount equal to the indemnity amount recoverable from the lessor in respect of the war damage instalment of contribution for each year of the term (whether increased or decreased hereafter) shall leave the clear sum of £—— ".

Such a provision would not appear to contravene section 34 of the Act; but an alternative method is to increase the yearly rent by the amount of the instalment (which will by now be known). This alternative method will, of course, leave open the possibility that the instalment may be increased; but many may prefer to sacrifice the increase for the certainty of receiving the stipulated amount. For it cannot be predicted with certainty that the above-mentioned formula will be held good.

Terms Not Exceeding Seven Years.

The Legislature does not, however, appear to have considered the case where a tenancy for say three, five or seven years has been taken and the tenant has agreed to pay " outgoings ". Such a tenant will not be liable to pay or contribute *directly* towards the instalments of contribution because he will not have a " proprietary interest ". There is no provision in the Act that any provision for the payment by persons holding interests *other than proprietary interests* of the instalments of contribution shall be void. The direct liability of each person holding a proprietary interest to pay an instalment to the Commissioners of Inland Revenue or make an indemnity payment cannot be affected by contract: section 34. Let us assume that A is freeholder, B holds a fourteen years lease of which four years remain to run at the relevant date, C holds from B a five years lease and has agreed with B to pay the rates, taxes and outgoings in respect of the property, and both B and C pay a rent which exceeds three-fourths of the net Schedule A assessment.

Now, if the effect of the covenant by C to pay the " outgoings " is that C must discharge the whole of the instalments without recoupment of any sort the result will be very strange. B, though liable to the Commissioners for payment of the instalments, will be entitled (whether he has or has not agreed to pay the outgoings in connection with the property) to collect from A by virtue of

the provisions of section 34 and the Fourth Schedule to the Act no less than 97½ per cent. of the amount of the instalments, thus (a) being indemnified against the whole of the instalments by C and (b) receiving a bonus of 97½ per cent. of the instalments from A.

Such a result is obviously not in accordance with the spirit of the Act, and is clearly an absurd one. On the other hand, the case of *Smith* v. *Smith*, [1939] 4 All E. R. 312, shows that a lessee who agrees to pay outgoings will not escape liability merely because that liability would normally fall upon *or be repayable by* the landlord. In the case last mentioned the tenant who had agreed to pay outgoings was held liable for what is usually termed "the owner's drainage rate". Again, it cannot be said that the contributions or the instalments of contribution are not outgoings "in respect of" the property; for section 18 provides that the contributions shall be made "in respect of" the (contributory) properties.

That the Courts will strain against the absurd result above mentioned is a reasonable conclusion, and in spite of the injunctions to be found in the *dicta* which deny the right of the Courts to deal suitably with a *casus omissus* by adding to the words of the statute under consideration, it is to be hoped that the Courts may find a means of exempting the "non-proprietary" short term tenant from liability to pay to the landlord the amount of the instalments of contribution.

It is thought that this end may be achieved by the application of liberal principles of construction, as follows :—

It is plain that where a lessee holds a term which constitutes a "proprietary interest" no agreement to the contrary will prevent him from recovering the appropriate indemnity payment from the landlord, if he is the party liable to pay the instalment, or prevent his landlord from recovering the appropriate indemnity payment from him if the landlord is the party liable to pay the instalment in question.

If it was the policy of the Legislature to prevent the parties to a lease for more than seven years from negativing the provisions of the Act as to the proportions in which the instalments should be borne by lessor and lessee, and if it was intended that no lessee for a term of seven years or less should be liable to pay any part of the instalments, the policy of the Act would be entirely frustrated if a contract by such a tenant to pay outgoings were to render such a lessee liable for the instalments, particularly as the lessor might be entitled to receive from a superior lessor *in addition* a substantial proportion of the very instalment which

the tenant had paid in full. However, "public policy" is notoriously an unruly horse, and it seems clear that the Legislature has in fact overlooked the case here dealt with.

Terms Exceeding Seven Years.

Nor does the Legislature appear to have covered the case in which the tenancy is for a term of upwards of seven years but is at an inclusive rent, the lessor having agreed to pay all outgoings. Clearly the lessee is liable to pay the instalments, and the lessor must indemnify him to *at least* the extent indicated in the Fourth Schedule; but must the lessor also relieve the lessee of the burden of the remainder of the instalments? It is submitted that there is nothing in the wording or the spirit of the Act which prevents the lessee from claiming such reimbursement if specially provided for in the lease or tenancy agreement. Section 34 refers only to indemnity payments and not to instalments, and section 35 is directed solely to the preservation of liability for instalments and indemnity payments notwithstanding changes of interest in the property or in mortgages after the liability for payment attaches.

The difficulty is, however, that where a tenant for a term exceeding seven years has agreed to pay all outgoings or even expressly to bear the instalments in full, section 34 avoids the bargain in so far as it purports to deprive the tenant of the right to claim the indemnity payment from the landlord. The result may perhaps be that whilst *no* covenant by the tenant can deprive him of the right just mentioned, the statute confers on the landlord in such cases no immunity from any contractual liability to the tenant, with the result that he must relieve the tenant of the whole of the burden of the instalments. It is readily admitted that such a result is not wholly logical, but where a statute does not deal fully with all cases which arise for consideration it may prove impossible to find entirely logical solutions for all the unsolved problems which are left for practitioners to wrestle with and for the Courts to decide.

Life Tenancies.

Where under a settlement the income of real or leasehold property is given to A for life, and A is thus tenant for life under the Settled Land Act the answer to the question, "Who pays the instalments of contribution?" depends upon whether the legal estate in the property has become vested in the tenant for life (assuming that no lease has been granted). For the person liable is the person who, at the relevant date, holds the legal estate in that proprietary interest which (as against any other persons holding

proprietary interests) confers the right to possession who is liable to pay the instalment: section 45 (1) (apart from property held on charitable, ecclesiastical or public trusts, requisitioned property and estates of deceased persons pending administration being granted, as to which cases see section 45 (2) and (3)).

But we are concerned only with the ultimate incidence of the instalments, whether the tenant for life is a Settled Land Act tenant for life or is entitled to the income for life under a "trust for sale" settlement.

As the contributions and indemnities under the Act are declared to be capital outgoings for all purposes (section 82), and as by section 48 capital moneys may be raised and applied in the discharge of the instalments or of indemnity payments due to be made in respect of property settled as last mentioned, it seems that in the normal case the tenant for life, whether under a "Settled Land Act" or "trust for sale" settlement, will bear no part of such payments out of income. However, it is not uncommon for a testator to give to a relation the use for life of a specified house, stating that such relation is to keep the house in repair and to discharge "all rates taxes and outgoings" in respect thereof. There is no provision in the Act which expressly prevents testators from imposing on beneficiaries the liability for indemnifying the trustees or the settled fund from liability in respect of the instalments, and if an express provision were inserted in the settlement to that effect there appears to be no sufficient reason for suggesting that it would be ineffective. It is, however, suggested, without undue confidence, that where there is no such express provision and no other indication in the settlement that the word "outgoings" is intended to apply to these new instalments (or indemnity payments) there is ground for contending that the testator did not wish to reverse the rule laid down by statute that "outgoings" of this kind may (and presumably *should*) be borne exclusively by the capital of the settled fund, since they are to be treated for all purposes as capital outgoings (section 82), and capital may be raised for their payment: section 48.

VENDOR AND PURCHASER.

Nor is the position as to apportionment between vendor and purchaser (in which relationship we include lessor and lessee) on the occasion of the grant of a lease or the sale of a leasehold or freehold interest any more straightforward.

The *Law Journal*, the *Law Times* and *Law Notes* (July, 1941), and the Law Society (*Law Society's Gazette*, June, 1941), appear to

be in agreement that instalments of contribution are not apportionable between vendor and purchaser in the absence of any provision in the contract for sale (including the grant of a lease). In the *Law Society's Gazette* (*supra*) the position is summed up as follows : "The contributions must accordingly be treated as a kind of capital levy imposed for a special purpose upon landowners throughout the country (with certain exemptions) during the period of five years. A contribution in respect of a contributory property is not made in respect of possible war damage to that property during the risk period"—September 3, 1939, to August 31, 1941—"but towards the expense of all payments to be made by the War Damage Commission under section 2 (1) of the Act in respect of war damage to land occurring during the risk period as defined by the Act." The distinction may well be clear to others, but is not clear to the writer. However, the *Gazette* proceeds : "The Council accordingly consider that there is no logical ground for apportioning the total contributions as between vendor and purchaser in accordance with the proportion of the risk period during which the vendor and purchaser respectively have owned the property sold."

Open Contract.

Where the contract is an open one not by correspondence the Council express the view that the vendor is liable for the instalments of contribution or sums payable by way of indemnity in respect of any such instalment which became due in respect of the property sold up to the proper time for completion, and that the purchaser will be liable for all subsequent instalments or indemnity payments, such instalments or indemnity payments not being apportionable. It is not quite clear whether the date referred to is the date when the instalment becomes payable (July 1) or the date when liability attaches to the owner (January 1).

Special Stipulation.

But when we turn to contracts by correspondence incorporating the Statutory Conditions of Sale, 1925, or common form conditions of sale (*e.g.*, the Law Society's Conditions and the National Conditions of Sale) all becomes obscure. The Council of the Law Society originally expressed the view that it would be equitable to apportion the contribution between vendor and purchaser according to the proportion of the risk period during which the purchaser and the vendor have (according to the date fixed for completion) respectively owned the property during the risk period. Now it appears (*vide supra*) that the Council consider that there is "no logical ground" for making an apportionment on the basis last mentioned. But

although they find no logical ground for an apportionment of the contribution in the case of an open contract, the Council consider that where the Statutory Conditions, the Law Society's Conditions of Sale, 1934, or the National Conditions of Sale (13th edition) are incorporated each instalment or indemnity payment is made in respect of the calendar year (presumably January 1 to December 31) in which it becomes payable and is apportionable as between vendor and purchaser on that footing. This view appears to be based on the Council's understanding of a passage in *Williams on Vendor and Purchaser* (4th ed.), p. 563. In the *Law Journal* for July 12, 1941 (at p. 267), Mr. Lightwood deals with the position, as stated in the *Law Society's Gazette*, both where there is an open contract and where there is a formal contract.

Open Contract.

Mr. Lightwood mentions that the Council consider that the contributions are outgoings which " so far as they become liabilities before the date for completion, fall on the vendor " and later that the vendor is liable for the instalments of contribution . . . which become due in respect of the property sold up to the proper time for completion, and that the purchaser will be liable for all subsequent instalments.

As Mr. Lightwood points out, if A owns a contributory property on January 1, 1941, and conveys it on the date fixed for completion to B, such date being prior to July, 1941, the first rule laid down by the Law Society means that A must pay the first instalment because his ownership on January 1, 1941, rendered him " liable " to pay the first instalment (even though he ceased to be the owner before July 1, 1941). On the other hand the second rule laid down by the Law Society means that B must pay the first instalment because no instalment became due before the proper date for completion, and the purchaser B must, according to the second rule laid down by the Council, pay the first instalment, because it is an instalment *due* after the proper time for completion. Obviously there is an unfortunate *lapsus calami* in the wording of the article in the *Law Society's Gazette*. For what it may be worth the writer's view is that as between A and B in the case last mentioned A must bear the burden of the first instalment because he was the owner on January 1, 1941, and was the person liable to discharge the first instalment, the deferment of the date for payment being, it is thought, immaterial.

It would also seem that in the first part of the Council's statement the word " contributions " should be " instalments of contribution ".

Formal Contract.

In the same article, Mr. Lightwood, the surviving joint editor of the work on which the Council appears to have relied, roundly repudiates the interpretation which the Council have placed upon the passage in *Williams on Vendor and Purchaser*. Referring to cases in which provision is made for the apportionment of rates, taxes and other outgoings the statement is made at p. 563 of the fourth edition of *Williams* that "where this is the case all such outgoings as in their nature extend over and are *attributable to a definite period of time* . . . should, it appears, be apportioned even though they may not be apportionable by law". The writer has italicised the words "attributable to a definite period of time" because although the instalments of contribution extend over a definite period they are hardly "attributable" to that period. The Council state in the *Gazette* above mentioned that the *contributions* are "a kind of capital levy". From the earlier part of the present article it will have been observed that the "instalments" are simply partial payments of this capital levy, and if there is no logical basis for apportioning the whole of the contribution why should the fact that the Government permits it to be paid by five instalments afford a logical basis for apportioning one-fifth of it? According to that line of reasoning, if the Act had provided for payment of the contribution by two yearly instalments the amount apportionable would be one-half of the contribution, a different amount being paid by the purchaser according to the particular form of deferred payment of the "capital levy" selected by the Government. Neither the Council nor Mr. Lightwood appears to have made any special point of the fact that a formal contract which provides for the apportionment of outgoings usually states also that the vendor shall pay all outgoings up to the date fixed for completion, though this fact is mentioned by the Council without comment. This point may, however, be of importance.

In *Midgley* v. *Coppock* (1879), 4 Ex. D. 309, the vendor had in fact agreed to pay all outgoings up to the time of completion, such outgoings being apportioned "if necessary". After completion it was found that a sum remained payable to the local authority in respect of road charges. In the Court of first instance Lopes, J., was apparently of opinion that the vendor was not liable, taking the view that the condition as to *apportionment* extended only to such charges as were capable of apportionment, and that the wording of the condition showed that the only outgoings to be paid by the vendor were such as from their very nature were capable of being apportioned, and that the road charges being incapable of apportionment did not fall within the condition

requiring the payment by the vendor of outgoings. On appeal this view was rejected and the vendor was held liable to reimburse the purchasers who had paid the road charges meanwhile.

On the hearing of the appeal the point was taken on behalf of the vendor that the expenses were a charge on the person and not on the property. It was common ground that (through pressure upon their tenants) successive owners could be compelled to pay the road charges. Lord Coleridge, C.J., observed : " All outgoings of this kind the vendor was by the contract of sale bound to discharge, and as he failed to fulfil his contract, he is liable to reimburse the purchasers." Lord Coleridge drew attention to the fact that the condition provided for the apportionment of rates, taxes and outgoings " if necessary " and that if those words had been left out there would have been great force in the view taken by Lopes, J., that the only outgoings to be discharged by the vendor were such as by their very nature were capable of being apportioned, and that the road charges being incapable of apportionment were not an outgoing within the clause. But Lord Coleridge, referring to the undertaking by the vendor to discharge outgoings, pointed out that some taxes, such as property tax, and some rates, such as the poor rate, were apportionable, and accordingly would be apportioned, but that the words " if necessary " showed that the undertaking by the vendor to discharge outgoings extended to outgoings which need not and cannot be apportioned. He continued : " The charge for improving the street cannot be apportioned and the vendor has not discharged it." The Court reversed the judgment of Lopes, J., and held that the vendor was liable to reimburse the purchasers.

Whether the insertion or omission of the words " if necessary " is as far-reaching in its effect as Lord Coleridge appears to have suggested, is a matter upon which opinions may differ. In fact the writer is by no means clear that Lord Coleridge intended to suggest that their omission would have freed the vendor from liability, *vis-à-vis* the purchasers, to pay the road charges. Rather was he seeking to explain that the words relied upon by Lopes, J., tended to confirm, and not to negative, the view that the vendor was liable.

In the writer's opinion it is immaterial for our present purpose whether the words " if necessary " are contained in the clause requiring the apportionment of outgoings.

It is well known that in certain circumstances road charges are payable (over a number of years) by instalments, but it has never been suggested that the yearly or half-yearly instalments are apportionable under the usual apportionment condition. Nor, it

is submitted, are the instalments of contribution under the War Damage Act, 1941, apportionable under a condition requiring the apportionment of outgoings. As the writer has pointed out elsewhere (*a*), an examination of sections 19, 20, 22, 30 and 31 of the Act will show that it is impossible to state in figures the amount of the total contribution or of the total instalments in respect of any given property in respect of the risk period. Nor is it possible to say whether the risk period will be extended without any increase in the "instalments" at present proposed.

In the present uncertain state of affairs practitioners may think that it is desirable to provide for the apportionment of the contributions or of individual instalments after they have explained the position to, and obtained the instructions of, their clients. Forms dealing with the following cases are to be found at p. 329, *infra*.

(1) Vendor bears first instalment: purchaser bears all other instalments.
(2) Purchaser bears all instalments (repaying to vendor the first instalment if already paid).
(3) Vendor bears all instalments.
(4) First instalment apportioned between vendor and purchaser. Purchaser bears all subsequent instalments.

Indemnity Payments.

So far as concerns the question of apportionment, we do not think that there is any distinction in principle between cases in which the owner of a proprietary interest is liable as direct contributor to pay an instalment and those in which a person is liable to make a contribution by way of "indemnity payment".

THE LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1941.

By P. H. Thorold Rogers, Barrister-at-Law.

After the Great Fire of London in 1666 the Corporation of the City promoted a Bill, which was accepted by Parliament, to deal with the commercial problems raised by the widespread losses. There was at that time no regular law of bankruptcy such as exists to-day and the laws as to debt were rigid in the extreme.

(*a*) *Law Times*, June 7, 1941.

It was obviously felt that it would be unjust to apply the full rigour of those laws to men whose failure was due to no fault of their own but was merely part of the general catastrophe; and another contributing factor was the desire to avoid the delays inherent in legal action. Special circumstances call for special remedies. The difficulties of the Great Fire were met by the appointment of Commissioners with special powers to deal with insolvencies arising out of the general destruction and to adjust obligations to which it would have been ridiculous or inequitable to hold the parties, or either of them.

Since the Great Fire there has been no catastrophe on such a relatively large scale. During the war of 1914—1918 protective measures were introduced, but they were mostly palliatives of a temporary nature. It is true that on the outbreak of the war there was imposed a general moratorium which lasted for some six months and that the Courts were given exceptional powers to relieve serving members of the forces in respect of certain types of contract; but apart from these very special and restricted examples, the furthest that ameliorative legislation ever went was to suspend temporarily the exercise of remedies and the enforcement of judgments against those who were rendered unable to meet their obligations by the war. The Courts (Emergency Powers) Acts, 1914—1918, formed the model upon which the Courts (Emergency Powers) Act, 1939, was based, but, as has been pointed out in an earlier number of *The Conveyancer* by the author, there are substantial and important differences in detail between the present and the earlier Acts (*a*).

It has been too often forgotten that the Courts (Emergency Powers) Acts offer no more than a narcotic. They do not in any way affect the substantive obligation. At the most they postpone for the time being the right of a creditor to extract payment by legal or quasi-legal process: the obligation itself remains unaffected, and where it is continuing in nature, or interest is accruing, it will be constantly increasing in size. The ever-mounting total of indebtedness has been a nightmare constantly haunting the debtor who has been ruined or all but ruined by the war, but it has presented an impasse to his advisers.

The main purpose of the Liabilities (War-Time Adjustment) Act, is to afford a cheap, fair and speedy machinery by which this omission can be rectified. In place of a narcotic designed

(*a*) The 1939 Act has since been amended in important respects by the Courts (Emergency Powers) Act, 1940, and we shall see later in this article that it has been still further amended by the Liabilities (War-Time Adjustment) Act, 1941, s. 27. The whole may now be cited as "the Courts (Emergency Powers) Acts, 1939 to 1941".

merely to dull the immediate agony of pain it offers the debtor the alternative of an operation as painless and pleasant as such an operation can reasonably be made to be. In other and more legal terms it enables a debtor who is financially embarrassed as a result of the war to obtain a discharge from his liabilities without necessarily sacrificing his business and livelihood and without the stigma and unpleasantness always associated with any but the very largest bankruptcies!

Three new conceptions are introduced by this Act: the scheme of arrangement, the protection order and the liabilities adjustment order; a new official is created—the liabilities adjustment officer (called "the adjustment officer" for short); and yet another burden is inflicted upon those long-suffering and already hopelessly overburdened servants of the public, the county court Judges.

Extent of the Act.

Before discoursing at greater length on any of these matters it is necessary to take precise account of the persons to whom and the territories within which the Act will apply. So far as creditors are concerned there is no difficulty. The Act applies to the Crown (*b*), and all the creditors of a debtor to whom it applies will be bound by its provisions. In the case of debtors, however, its provisions are much more restricted. It applies to firms (*c*) and to certain private companies, but to no other corporate body (*d*). The companies in question are those private companies whose principal object is the carrying on of a business for profit (*e*). In the case of all three, individual, firm or private company, there is also a territorial qualification. For the Act to apply to a firm or company as a debtor it must either carry on business in England or have ceased by reason of war circumstances to carry on in England a business previously carried on there. In the case of an individual the qualification is slightly less restrictively drawn; either residence or the carrying on of a business in England will suffice, and in either case it is possible to justify the absence of the necessary qualification by proving that it is the result of war circumstances (*f*).

The Act does not apply directly to Scotland or Northern Ireland and it contains a very curious provision which enacts that "where the principal place of business of a debtor (whether an individual,

(*b*) S. 23.
(*c*) S. 14. There are special provisions in this section dealing with the problems raised by the unlimited liability of partners.
(*d*) S. 15.
(*e*) S. 15 (3).
(*f*) S. 24 (1).

firm or company) is in Scotland or Northern Ireland, the debtor shall not be deemed to be carrying on business in England ". The author confesses to being quite unable to comprehend the full purport of this proviso. To say that a debtor shall not be deemed to be something is not the same as to say that he shall be deemed not to be that something. The use of the former phraseology suggests that the draftsman had in mind some earlier provision of the Act under which residence or the carrying on of a business in England were to be presumed; but no such provision is now to be found in the Act and the language used falls to be construed as it stands. One thing at least is clear : even if the effect of the proviso is to place outside the protection of the Act the company or firm whose head office is in Scotland or Northern Ireland, it will not exclude a debtor if, although disqualified so far as his business is concerned, he nevertheless resides in England.

The Act applies (with few exceptions) to property wherever situate and to contracts, debts and liabilities whether made or incurred in England or elsewhere (*g*). The powers conferred by it will be exercisable only in the English Courts; but a scheme of arrangement, a protection order or a liabilities adjustment order made under it will bind a Scottish, Northern Irish or Manx Court and they are directed to have regard to the opportunities it affords when dealing with a debtor to whom it may apply (*h*).

Scheme of Arrangement.

This is a new form of composition with creditors. It does not call for any proceedings or for the intervention of the Court but is perfected by the consent of the debtor and his creditors and the approval of the adjustment officer. It is in no way subject to the Deeds of Arrangement Act, 1914 (*i*).

The relevant section is section 1. This entitles " any person who is in serious financial difficulties owing to war circumstances " to apply to a liabilities adjustment officer " for advice and assistance in enabling him to arrive at an equitable and reasonable scheme of arrangement with his creditors . . .". The procedure to be followed is laid down in the Liabilities (War-Time Adjustment) Rules, 1941, rr. 1–10. Application will be made to the adjustment officer for his assistance on a form which may be had from a registrar of county courts (Form 1 in the Appendix to the Rules); the adjustment officer will then give the debtor notice of an interview (*j*) at which he will require from the debtor a

(*g*) S. 25 (2).
(*h*) S. 25 (3).
(*i*) S. 1 (10).
(*j*) R. 2.

statement of affairs (not necessarily in formal shape) showing his creditors and the nature of their claims and such other information as the officer may require (*k*). The adjustment officer may refuse the application if he considers that he can be of no assistance or that the debtor is not for any reason within the ambit of the Act (*l*); but in most cases the next step will be the summoning by the adjustment officer of a meeting of creditors. They will be sent a copy of the statement of affairs and will be requested to prove their debt (*m*). A meeting of the creditors will then take place at which the scheme proposed will be discussed and put to the vote (*n*). If the scheme is unanimously approved by the debtor and all those creditors with provable debts to whom notice of the meeting was given the adjustment officer *must* then signify his own approval to it. If the creditors are not unanimous (as will be the case if one who has had notice does not attend) the adjustment officer *may* approve any scheme which is assented to by the debtor and a majority in number and value of the creditors (section 1 (2)). The adjustment officer certifies his approval according to Form 16 and deposits the scheme and the written assents of any assenting creditors with the appropriate Court (*o*); the scheme is then presumed to have been duly made and approved until varied or revoked by the Court (*p*).

It will be seen that the whole procedure turns upon the adjustment officer whose certificate of approval is essential to the final validity of the scheme; but it is thought that it is not absolutely essential that the whole of this procedure should be gone through and if debtor and creditors can agree upon a draft scheme they may take it direct to the adjustment officer for approval (*q*).

The object of the Act being to assist those whose difficulties are due to the war we find that application may only be made if the debtor is financially embarrassed as a result of war circumstances (*r*). In the words of the Act this means that the debtor must trace his difficulties back to "circumstances arising directly or indirectly out of any war in which His Majesty may

(*k*) R. 3.
(*l*) R. 4.
(*m*) R. 6 and Form 14.
(*n*) R. 7. Attendance may be by proxy, for which no stamp will be necessary: s. 22.
(*o*) R. 8 (2).
(*p*) S. 1 (4).
(*q*) He will wish to be certain that no other creditors have been overlooked and will probably insist on inquiries.
(*r*) Only the debtor can apply to an adjustment officer. A creditor cannot apply, though he may make application for an adjustment order under s. 3.

be engaged " (*s*). Actual insolvency is not necessary. Indeed, it is clearly intended that the Act shall be used by those hovering on the brink of this disaster as well as by those who have already fallen into it. Section 1 (1), for instance, in speaking of the scheme of arrangement which it is to be the duty of the adjustment officer to attempt to negotiate, refers to " such a scheme . . . as will enable [the debtor], if he carries on a business (*t*) or would, but for war circumstances, carry on a business, to preserve that business or to recover it when circumstances permit . . ." (*u*). A debtor, then, may seek a scheme of arrangement if he sees his means of livelihood in peril or if the discharge of his liabilities (present and future) will render him unable to carry on his business and will deprive him of the capital, premises, plant, etc., necessary to revive and restore it when circumstances permit. But he must show that his difficulties are the result, direct or indirect, of the war. The debtor who was insolvent, or nearly so, before the outbreak of war will find it difficult to discharge this onus, for it has been accepted, though never actually so decided, under the Courts (Emergency Powers) Act, 1939, that the commercial instability and the general decline in trading conditions which were the forerunners of the actual declaration of war cannot be regarded as either the direct or indirect consequences of it. But it will not be safe to push the analogy of the Courts (Emergency Powers) Act, 1939, too far. The mere fact that a business was not paying in 1938 or the first nine months of 1939 will not be conclusive; if the debtor can show a reasonable probability that it would have picked up in time but for the war, it is thought that he will have done all that is required of him.

The creditors who are entitled to notice and to vote upon the scheme are all those who have provable debts, that is all those whose debts " would be provable in bankruptcy if a receiving order had been made " (*x*) at the date fixed under section 6 (1) as the " material date " for the purposes of this section. Creditors with future and contingent claims may prove (*y*) and the bankruptcy rules as to mutual credit and set-off will apply (*z*).

A creditor who receives no notice of a proposed scheme (*a*) will not be bound by it and may apply to the Court to extend it with or without variations so as to include himself, or to revoke

(*s*) S. 27.
(*t*) This includes a profession: s. 27.
(*u*) S. 1 (1).
(*x*) S. 17 (1).
(*y*) R. 38.
(*z*) R. 37.
(*a*) The method of service is that prescribed in Order VIII, r. 39, of the County Court Rules; r. 48.

it (*b*); but a creditor who has had notice will be bound by any scheme which is duly approved although he himself did not attend or vote upon it (*c*). Such a creditor, in common with any other creditor who did not actually assent to the scheme, may appeal to the Court to vary or revoke it, but only on the ground that it is unequitable or unreasonable—a proposition which he will have to establish before he can obtain an order (*d*). Any creditor, therefore, who receives notice of a proposed scheme of arrangement, will be very ill-advised unless he takes steps either to attend at the meeting or to be represented by a proxy.

It is expressly declared in section 17 (3) that nothing in regulation 4 of the Defence (Evacuated Areas) Regulations, 1940, is to be taken as preventing any sum being dealt with in a scheme of arrangement, and it is thought that the Courts (Emergency Powers) Acts, 1939—1941, can have no application (even where leave to proceed has been refused) because the creditor in assenting to a scheme is not enforcing a judgment or exercising a remedy within the meaning of those Acts.

In this connection a great deal of importance is going to be attached to the manner in which assent is signified. The language of the relevant rules is regrettably ambiguous; rule 8 (1) speaks of a scheme being binding if "the majority in number and value of . . . creditors assent to a scheme, and signify their assent *in writing by signing the scheme or otherwise*".

The first point to notice here is the contrast with the Deeds of Arrangement Act, 1914, s. 3 (3), which requires assent to be "in writing by signing the scheme *but not otherwise*". The comparison leaves one in no doubt, if indeed any doubt could ever have been felt, that the creditor's signature to the scheme itself is not essential; but must assent always be expressed in writing or may it also be verbal or arise by implication or by estoppel *in pais?* It is open to argument that the words "or otherwise" in rule 8 (1) cited above are in intentional contrast to "in writing by signing the scheme" and refer to *any other* manner of signifying assent; but it is thought, on an examination of the rules as a whole, that the intention is to require assent in writing in all cases, such assent being signified either by signing the scheme or in some other manner (*e*). Even if this be correct, however,

(*b*) S. 1 (5).
(*c*) S. 1 (2).
(*d*) S. 1 (4). The creditor must file a request in the county court for the entry of the appeal within twenty-one days of the service upon him of notice of the approval of the scheme: r. 9.
(*e*) See, *e.g.*, r. 8 (2) which requires the adjustment officer to deposit at the appropriate Court "the scheme . . . together with the written assent of any assenting creditors".

it may remain an open question whether a creditor may not be estopped by conduct from asserting the absence of such assent.

The bankruptcy practice will, presumably, be followed and creditors will be required to prove their debts before being admitted to vote (*f*).

It has already been remarked that where unanimity cannot be achieved the majority in number and value of the creditors may bind a minority. For this purpose all debts will be viewed alike. There are no provisions comparable to those of the Deeds of Arrangement Act, 1914, s. 3 (5), under which creditors for less than £10 are reckoned only in computing the majority in value. Before a minority of creditors will be bound the circumstances must be such that the Court could have made a liabilities adjustment order under section 3 (*g*).

A very wide scope has been prescribed for a scheme of arrangement. It "may provide for the composition of debts, the postponement of payment of debts, the assignment or charging of any property of the debtor in favour of the creditors, and the management or disposal of the debtor's business (if any) or any other part of his property, and may, with the assent of the other parties thereto, vary the terms of any lease, mortgage or contract to which the debtor is a party" (*h*). But these powers will not be exercised, as in bankruptcy, solely with the aim of producing as large a sum as possible for the creditors. Regard must be had to the desirability of preserving the debtor's business or the means by which he will revive or recover that business when circumstances permit (*i*).

It is to be hoped that the schemes will run themselves, but they can, if necessary, be enforced by the Court on the application of the adjustment officer or of any creditor.

The debtor, apparently, cannot apply: section 1 (6). Disobedience to the orders of the Court will be a contempt, "to be punished accordingly"—a provision likely to cause difficulties in the county court where it is believed that there is only power to deal summarily with contempts committed in face of the Court and where all other contempts must be taken to the High Court.

(*f*) The method of proof will be that prescribed in the Bankruptcy Act, Second Schedule, paras. 1—9 and 19—22: r. 6 (1); but the present value of future and contingent liabilities need not be assessed: r. 38; and there are special provisions as to the valuation of securities: r. 39.

(*g*) S. 1 (2) (b). There are also four other restrictions. Thus a debt preferred in bankruptcy must be granted an equal degree of priority (unless the creditor waives it): s. 1 (2) (a); and release cannot be conferred in respect of a liability from which a discharge under the Act would not release the debtor: s. 1 (2) (c).

(*h*) S. 1 (3).

(*i*) S. 1 (1).

A debtor who fails to carry out a scheme may lose the protection of it, for the Court may revoke it on this ground (*k*); as also on the ground that it is unjust to any of the parties or that it cannot proceed without undue delay (*l*).

Registration of Schemes of Arrangement.

The adjustment officer will deposit each scheme together with the written assents of the creditors at the appropriate Court, keeping a copy of the scheme for himself (*m*).

The Registrar of County Courts will keep an index of schemes of arrangement (*n*).

The adjustment officer will also send certain details to the Registrar of Deeds of Arrangement who will keep an alphabetical register under the names of the debtors.

Creditors and other interested persons may, therefore, search the adjustment register kept by the Registrar of Deeds of Arrangement (*o*), or an official search may be had for the same small fee (*p*). Alternatively, they may search the index kept by each Registrar of county courts of the schemes deposited with him (*q*), or may request an official search (*r*). This will enable them to discover whether or not a particular debtor has entered into a scheme under the Act.

The scheme itself will be open to inspection during office hours and the Registrar of the county court will, on demand and a payment of the fee, supply a copy (*s*).

Costs and Fees in Connection with a Scheme of Arrangement.

Although fees will not usually be payable in respect of the services of an adjustment officer provision should be made in any scheme for the payment or recovery of any special expenses (*t*), and a percentage fee may be assessed and charged in his discretion (*u*).

Legal representation is possible before an adjustment officer only with his consent, and in no case may a creditor add his costs

(*k*) S. 1 (7).
(*l*) *Ibid.*
(*m*) R. 8 (2). Where the debtor is a company the scheme will go to the registrar of companies to be placed on the relevant file: r. 27 (3).
(*n*) R. 25 (4).
(*o*) R. 54.
(*p*) *Ibid.* The fee is 1s.
(*q*) R. 25 (9).
(*r*) *Ibid.*
(*s*) R. 8 (3).
(*t*) R. 46 (1). See r. 46 (3) for the definition of special expenses. The adjustment officer may remit the payment of these on the ground of hardship: *ibid.*
(*u*) R. 46 (2).

to his claim. The costs of a debtor are not expressly referred to; possibly they will be dealt with on the same lines as in bankruptcy (*x*).

As between solicitor and client costs will be taxable under Scale B (*y*).

Protection Orders.

This is an untried and novel form of order. When granted it will operate automatically to stay all proceedings against the debtor and to prohibit the initiation of any new proceedings or the exercise of any remedy against him. In effect, it imposes a complete moratorium in respect of all the debtor's provable debts (*z*). Unless leave can be obtained under section 3 (2) (a), the prohibition it imposes will remain effective (*a*); but it applies only to provable debts (*b*), and these are so defined (*c*) as not to include debts contracted after the date of the order. It follows, therefore, that the powers of a creditor in respect of such a debt will usually be unaffected by a protection order.

Although the jurisdiction to make such an order is only exercisable by an English Court (*d*); and only in respect of debtors who satisfy the qualifications explained above for a scheme of arrangement (*e*), the order once made will operate to stay and prohibit all proceedings against the debtor in the Courts of Scotland, Northern Ireland and the Isle of Man (*f*).

Any creditor who is contemplating hereafter the exercise of any remedy (or the initiation of proceedings) against his debtor must now bear in mind the possibility that a protection order has been made; for should he implement his right of, say, distress in ignorance of the existence of an order, he will render himself liable to an action for damages, which may prove substantial (*g*).

As both protection and adjustment orders are registered in the same manner, and in the same places, as a scheme of arrangement, inquiry can easily be made in all proper cases; it may also prove advisable to ask the debtor himself whether any order has been made.

When making a protection order the Court has wide powers

(*x*) R. 50 (1).
(*y*) R. 50 (2).
(*z*) Debts which are not provable in bankruptcy are not provable under this Act and are not affected by a protection or adjustment order: s. 3 (2).
(*a*) As to the costs of pending proceedings, see s. 3 (2) (a).
(*b*) S. 3 (2).
(*c*) S. 17.
(*d*) S. 24 (6).
(*e*) S. 24 (1).
(*f*) S. 24 (3).
(*g*) Cf. *Bowmaker* v. *Tabor* (1941), 2 All E. R. 72.

to deal with and to preserve the debtor's property (*h*). A receiver and manager may be appointed, the property may be brought into Court, charged in favour of creditors or vested in a trustee (*i*).

No stamp duties will be payable in connection with any operation under the Act (*k*).

A protection order will often precede and will always accompany an adjustment order (*l*).

It is designed to secure two very similar results; first, to afford a debtor temporary relief pending the making of an adjustment order and, second, to secure that no person attempts to make an unfair use of the adjustment order by pressing his own claim.

When making an adjustment order, therefore, the Court will always make a protection order at the same time unless one is already in force (*m*).

This will often be the case, because a protection order may be made at the preliminary hearing if the Court is satisfied that a *prima facie* case has been made out. This application will be *in camera* (*n*); it will be made *ex parte* where the applicant is the debtor (*o*), and may be entertained, with the leave of the Judge, by the Registrar (*p*).

It may also be noted that an adjustment officer, who thinks, when consulted about a proposed scheme of arrangement, that a protection order is needed, shall so advise the debtor and may assist him to make his application.

Adjustment Orders.

The persons who may apply for an adjustment order and the circumstances in which their application will succeed are set out in section 3. The possible applicants are, firstly and obviously, the debtor himself; secondly, any creditor who is prevented by regulation 4 or regulation 6 (2) of the Evacuated Areas Regulations (*q*) from commencing or prosecuting his claim or exercising a remedy; and thirdly, any creditor whenever the debtor has been granted and is still enjoying protection under the Courts (Emergency Powers) Act, 1939 (*r*).

(*h*) S. 3 (3).
(*i*) *Ibid.*
(*k*) S. 22.
(*l*) S. 3 (6).
(*m*) S. 3 (6).
(*n*) R. 14 (1).
(*o*) R. 16. Four clear days' notice are required if the applicant is a creditor, and the debtor will be respondent.
(*p*) R. 16. It is doubtful whether this leave can be given generally; contrast r. 15 (1). There is obscurity also as to a right of appeal to the Judge: contrast r. 15 (2).
(*q*) See *The Conveyancer*, Vol. 5, p. 47.
(*r*) S. 3 (1).

There is a subtle distinction between the second and the third cases. A creditor can only vouch the Evacuated Areas Regulations as his authority if he is himself prevented by them from recovering his debt (*s*), but where the debtor is enjoying relief under the Courts (Emergency Powers) Act any creditor—not necessarily the one who has been refused leave to proceed—may apply for an adjustment order (*t*).

The circumstances in which an adjustment order will be made have already been carefully considered, and the section is so drawn as to enable the Court to exercise this ameliorative jurisdiction not only when the debtor is insolvent but also when his affairs have reached such a state that he cannot meet his liabilities (present and future) without sacrificing his business or means of livelihood or without depriving himself of the wherewithal to recover that business or means of livelihood hereafter.

The actual grounds, as set out in the Acts, are that :

> " owing to war circumstances—
>
> (a) he is unable to pay his accrued debts or will be unable, after payment of his accrued debts (if any), to meet, as they fall due, any future liabilities in respect of obligations already incurred; or
>
> (b) is in such a position that, if he were required to pay his accrued debts and to meet, as they fall due, any such future liabilities as aforesaid, he would have no reasonable prospect of preserving or recovering his business, or would otherwise lose his means of livelihood " (*u*).

The author ventures to suggest that these words are not entirely free from difficulty. The phrase " means of livelihood " is nowhere defined. Is it to be read *ejusdem generis* with business, or can it be extended so as to apply also to the small capital fund which is the sole source of income of the elderly or invalid? Again, why limit the future liabilities which may be considered to " those already incurred "? The natural inference from this is that no account may be taken of any potential future liabilities, yet it is under this head that will fall the greater part of the daily or weekly

(*s*) S. 3 (1) (ii). It is interesting to recall that under reg. 4 an evacuated debtor enjoys a complete moratorium in respect of certain classes of " local " debts such as rent, rates, etc. This moratorium is in no way dependent upon the debtor's means or his ability to pay the debt in question, and the result of reading that regulation and the present section together seems to be that the insolvent or embarrassed debtor who has been evacuated will be liable to adjustment proceedings, whereas his solvent brother can snap his fingers in the face of his creditors so long as the evacuation period continues.

(*t*) S. 3 (1) (iii).

(*u*) S. 3 (1).

expenditure—on a cash basis—of the ordinary man. It will indeed be unfortunate if no account may be taken of the debtor's future need for a roof over his head and a fair quantity of food, etc. (*w*).

The Court will enjoy extremely wide powers when making an adjustment order and a very large discretion. Unlike the jurisdiction in bankruptcy, it is not the sole function of the Court to extract from the debtor, for the benefit of his creditors, the maximum amount possible by the realisation of all available assets.

The Court is to provide for the payment of debts " . . . either in full or to such extent as the court considers practicable, . . . and for that purpose may provide for the realisation of the debtor's property existing at the date of the order or becoming available at any time before the order of discharge " (*x*); the debtor may also be ordered to make payments out of his future income (*y*). But at the same time the Court may provide for securing the maintenance of the debtor and his family, and for exempting from realisation the home, furniture, bedding and clothing of the debtor and his family and also his tools (*z*).

Premises and other property necessary for any business (including the professions) carried on by the debtor may also be reserved in the discretion of the Court; where the business has ceased as a result of war circumstances the debtor may be allowed to retain the means of recovering it (*a*), but regard must be had " to the prospects of the business and the likelihood of ultimate benefit to the creditors as well as to the debtor " (*b*).

There is also a useful power to postpone realisation where a temporary depreciation or other sufficient cause renders it desirable (*c*).

Priority of Debts.

In adjustment proceedings debts will normally be payable in the same order as in bankruptcy. The usual preferred debts are again granted priority (*d*), and some, but not all, of the usual

(*w*) This difficulty is not surmounted by s. 4 (3), which entitles the Court, in making an order, to secure the maintenance of the debtor and his family, but which does not affect the circumstances in which an order may be made.
(*x*) S. 4 (1). Trust property is excluded (*ibid.*).
(*y*) *Ibid.*
(*z*) The fact that they are not being used at the moment is to be disregarded if it is due to war circumstances.
(*a*) S. 4 (3).
(*b*) S. 4 (3) (c) (ii).
(*c*) S. 4 (3) (d).
(*d*) S. 9 (1) (a). They will rank *pari passu* amongst themselves.

deferred debts are liable to be postponed by order of the Court (*e*).

All other debts will rank equally amongst themselves, but to avoid exceptional hardship payment of one or more debts in priority to the others may be directed (*f*). Secured creditors are specially dealt with. A mortgagee has four alternatives :

(a) if he is entitled and obtains the leave of the Court he may realise his security and prove for the balance (if any);

(b) if he does not realise he may surrender his security and prove for the whole amount secured;

(c) if he neither realises nor surrenders he may value the security and prove for the excess of the debt over the value (*g*).

The three alternatives here mentioned are those specified in the Act. It will be observed that they are optional; there remains, therefore, yet a fourth. A secured creditor may, if he pleases, do nothing (*h*). He will not then lose his security, but will be unable to prove, and the Court may reduce the rate of interest (*i*) and may suspend or vary the dates and manner of repayment of the amount secured (*k*).

Disclaimer, etc.

In addition to the powers already discussed the Court has power in an adjustment order to provide for the disclaimer of any lease, contract or property which could be disclaimed in bankruptcy, the other party being remitted to his proof for damages in the adjustment proceedings (*l*).

Unlike the position in bankruptcy, this power does not stand alone. The Court may, on the application of the other party to any contract with the debtor, rescind that contract, awarding damages to either party (*m*), or it may vary it in the interests of all parties (*n*). It may also allow the debtor to remain in possession of any premises and may reduce the rent payable therefor, though not below the lettable value and not unless that value has

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(*e*) The postponement is not automatic, but rests in the discretion of the Court. The debts are (i) those owed to husband or wife, (ii) a share of profits in consideration of a sale of goodwill, and (iii) money lent in return for a promise of a share of profits: r. 41.

(*f*) S. 9 (2).

(*g*) S. 7 (1). The valuation may be amended at any time before realisation, and, on realisation, the value shall be deemed to be the amount received: s. 7 (2).

(*h*) S. 9 (3).

(*i*) S. 9 (3). But not below the net annual value: s. 9 (4).

(*k*) S. 9 (3). Any provision that the whole principal shall become immediately payable on default may be suspended and any consequential amendments may be made (*ibid.*).

(*l*) S. 5 (1). See r. 40 for the effect of an order of disclaimer.

(*m*) S. 5 (3).

(*n*) S. 5 (4).

fallen as a result of the war (*o*). The debtor's interest will then not be assignable except with the leave of the Court (*p*).

This opens up the interesting problem whether the Court can permit a debtor to remain on in possession of premises not subject to the Rent Restrictions Acts after his tenancy has determined by effluxion of time. Although no such power exists under the Courts (Emergency Powers) Acts, 1939 and 1940 (*q*), the scope of a protection order is so wide and the Court's powers are so considerable that it is thought that such a power can now be exercised in adjustment proceedings, and this view is strengthened by the fact that the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 1 (10), defines "short tenanacies" so as to include the interest of a person who is "holding over" under the Liabilities (War-Time Adjustment) Act, 1941.

Discharge.

The Court has the same powers as in bankruptcy to grant a discharge, whereupon the debtor will be free from all provable debts except those not affected by a discharge in bankruptcy (*r*) or those arising out of a contract in respect of land or goods of which the debtor remains in possession (*s*).

The discharge operates immediately, and there is no power to make it conditional or suspended; it follows that the bankruptcy rules and practice as to offences have no application and the Court's discretion is unfettered.

The manner of application is prescribed in rule 23.

Space does not permit of a discussion of the special provisions as to deceased debtors, firms or companies (*t*).

Courts.

Except in the case of companies the jurisdiction under this Act will in all cases be exercised by the county court (*u*) subject to the usual power of removal to the High Court (*x*). What

(*o*) S. 6 (1). Similar provisions as to hire-purchase transactions will be found in s. 6 (3).

(*p*) S. 8 (4). Prospective purchasers should watch this danger and search the adjustment register for the existence of any orders.

(*q*) The only case in which a debtor "holds over" under those Acts is where leave to proceed has been refused in proceedings for possession based on a forfeiture for non-payment of rent occurring before July 10, 1940. Since that date there is no forfeiture where leave to proceed is refused: Courts (Emergency Powers) Amendment Act, 1940, s. 1 (2).

(*r*) S. 12 (1).

(*s*) S. 12 (2). The protection order or adjustment order may be kept alive so far as concerns such contracts: *ibid.*

(*t*) See ss. 13, 14 and 15 respectively.

(*u*) S. 20.

(*x*) *Ibid.*

is more, when once a protection order has been made all applications for leave to proceed under the Courts (Emergency Powers) Acts, 1939 to 1941, must be made to the appropriate county court, which can even vary an existing order of a superior Court (*y*).

Costs.

Legal representation will be permitted before the Court, and the costs of a creditor applicant may be provided for in an adjustment order, but the costs of a creditor respondent will not usually be allowed. Costs will be on Scale A unless otherwise directed (*z*).

Registration of Protection and Adjustment Orders.

These orders will be registered with the Registrar of deeds of arrangement, who will keep the adjustment register. The orders may be inspected at the respective county courts, whose Registrars will keep an alphabetical index (*a*). Orders affecting companies will be gazetted and entered in their files (*b*). In all cases an official search may be had (*c*). The importance of making such a search before exercising a remedy or taking a conveyance of land has already been emphasised.

EXTENSION OF COURTS (EMERGENCY POWERS) ACTS, 1939 AND 1940.

These Acts, which comprised the Courts (Emergency Powers) Act, 1939, and the Courts (Emergency Powers) Amendment Act, 1940, have been considerably extended in scope by the Liabilities (War-Time Adjustment) Act, 1941, s. 26, and the three Acts are now to be read together and may be cited as the Courts (Emergency Powers) Acts, 1939 to 1941 (*d*).

The Courts (Emergency Powers) Act, 1939, was originally restricted in its application to obligations incurred before September 3, 1939, and although it was extended by the Evacuated Areas Regulations, 1940, there can have been few cases in which this has proved of any value to debtors. Regulation 6 of those regulations enables the Court to exercise its powers under the 1939 Act in respect of judgments or orders obtained upon obligations incurred between September 3, 1939, and July 10, 1940; but the Court was only so to act if the debtor made an

(*y*) S. 3 (2) (c).
(*z*) R. 51.
(*a*) R. 25.
(*b*) R. 35.
(*c*) Rr. 25 and 54.
(*d*) Liabilities (War-Time Adjustment) Act, 1941, s. 26 (4). It is unfortunate and a matter for some criticism that the amendment is by no means easy to comprehend and that its operation will need careful study before it is properly understood.

application for this purpose and showed that he was unable to pay as a result of the evacuation of an evacuation area (*e*).

Apart, then, from this slight extension of the 1939 Act it remained true that a debtor could only claim relief in respect of obligations incurred before September 3, 1939, a qualification which has worked great hardship as the changing fortunes of the war and its altered battle fronts have brought ruin or unexpected poverty to those who had no reason to fear it when they incurred their obligations, although they did so after September 3, 1939.

Broadly speaking, the effect of the amendment made by the Liabilities (War-Time Adjustment) Act, 1941, is to extend the protection of the 1939 Act to almost all obligations incurred after September 3, 1939; but we shall see that this extension is not complete in all cases and that, as a result of the qualifications and of the curious manner in which the amendment is made, it may still be of importance to both debtor and creditor in the appropriate cases to have regard to the decisions on the old law and to the provisions of the Evacuated Areas Regulations, 1940.

Where a judgment or order has been obtained—

> " (a) for the recovery of a debt which has become due by virtue of a contract made after the commencement of the principal Act; or
>
> (b) for the recovery of possession of land in default of payment of rent, or for the recovery of possession of land other than a dwelling-house by a mortgagee thereof by reason of a default in the payment of money, being land held on a lease or tenancy, or subject to a mortgage, entered into after the commencement of the principal Act; or
>
> (c) for the delivery of any property other than land by reason of a default under any contract made after the commencement of the principal Act in the payment of money "

the provisions of the 1939 Act *may* now apply; but they will not necessarily do so.

To obtain this protection the debtor must apply to the Court, which " may . . . direct that the principal Act shall have effect as if the contract, lease, tenancy, or mortgage had been made

(*e*) There are certain other alternative grounds. For a discussion of the Regulations in detail see Solicitor's Handbook of War Legislation, Cumulative Supplement, pp. 173 *et seq.*

So far as the exercise of the remedies of self-help are concerned the criteria remain the same, but the procedure under the Evacuated Areas Regulations, 1940, is different; the debtor who fears that his creditor may be about to exercise a remedy against him may apply for an injunction to the Registrar of his county court.

or entered into before the commencement of that Act . . ." Before such an order will be made the Court must be satisfied, and the onus will be upon the debtor, that "he is unable immediately to satisfy the judgment or order, or to pay the rent or money, by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, *being circumstances which arose after the contract, lease, tenancy or mortgage was made or entered into*".

Apart from the words here printed in italics the facts to be proved are precisely similar to those required under the 1939 Act; but the addition of the qualifying words greatly increases the burden upon the debtor's shoulders, more especially as, the onus of proof resting upon him, he will necessarily fail unless he can affirmatively prove what is required of him.

The rules made under this Part of the Liabilities (War-Time Adjustment) Act, 1941—the Courts (Emergency Powers) (No. 1) Rules, 1941, and the County Courts (Emergency Powers) (No. 1) Rules, 1941—contain provisions designed to secure that the debtor has notice of this right. Thus we find in rule 4 of the High Court Rules that the plaintiff who commences an action for relief of the sort mentioned in section 26 (1) of the Liabilities (War-Time Adjustment) Act, 1941, must insert in his writ or originating summons a statement showing that the contract or obligation in question was incurred after September 2, 1939 (*f*), and must also serve with the writ or summons a notice to the effect of Form 10 and a counter-notice to the effect of Form 11.

These forms are appended to the Rules. In the county court the plaintiff must include in his præcipe a statement showing which of the respective paragraphs in section 26 (1) (*g*) applies to the action and the Registrar will then annex the prescribed Form automatically (*h*).

In the case of proceedings which were already commenced before June 12, 1941—the date of the Rules—it is obviously impossible to require service of the notice with the writ or præcipe; but we find, instead, that the plaintiff may not enforce any judgment or order obtained until at least fourteen days have elapsed after the service by him of a notice to the effect of Form 15 (*i*).

Apart from these provisions there is no restriction upon the enforcement by the creditor of his judgment or order by execution unless the debtor can persuade the Court to extend the 1939 Act.

(*f*) It would seem to be doubtful whether the omission to insert this statement will not invalidate all subsequent proceedings and be incurable by amendment.
(*g*) See p. 47, *supra*, where they are cited.
(*h*) County Court (Emergency Powers) (No. 1) Rules, 1941, r. 6.
(*i*) High Court Rules, r. 5; County Court Rules, r. 6.

It will be observed, however, that actions for the recovery of possession of a dwelling-house by a mortgagee by reason of a default in the payment of money are specifically excluded from section 26 (1). This was because they are afforded special treatment in section 26 (2). This subsection is of a more positive nature. It imposes a restraint upon the exercise of any of the "remedies" dealt with by the 1939 Act (*k*), if they are available in consequence of a default in performing an obligation incurred after September 2, 1939. Before exercising any of these remedies the creditor must obtain the leave of the Court, but the onus of establishing the facts which will justify the grant of relief will still rest upon the debtor. A similar restraint is laid by the same sub-section upon the enforcement, by execution or otherwise, of a judgment or order (whenever given) for the recovery of possession of a dwelling-house subject to a mortgage entered into after September 2, 1939, by the mortgagee by reason of the non-payment of money. Leave must, therefore, be obtained by the creditor before he can enforce such a judgment or order, and there is no need for the debtor to apply. The creditor must serve a notice to the effect of Form 14 and a counter-notice—Form 11—with his originating summons (*l*), and the special provisions of the Courts (Emergency Powers) Amendment Act, 1941, s. 3, will apply on the question of onus of proof. By these a defendant who does not appear or is not represented is deemed to be serving in the forces and any person so serving or deemed to be serving is presumed to be unable to pay by reason of the war until the contrary is proved (*m*).

Extension of Possession of Mortgaged Land (Emergency Provisions) Act, 1939.

The Liabilities (War-Time Adjustment) Act, 1941, s. 27, by repealing the words "made before 3rd September, 1939" in section 1 (1) of the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, has so extended that Act as to apply it equally to mortgages contracted after September 2, 1939.

(*k*) Except for pawnbrokers' sales, and proceedings for the appointment of a receiver or for the recovery of possession of land.

(*l*) High Court (Emergency Powers) (No. 1) Rules, 1941, r. 7 (1).

(*m*) Solicitor's Handbook of War Legislation, Cumulative Supplement, p. 86.

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Hire-purchase—chattels sold to finance corporation—implied breach of warranty of fitness—Drury v. *Victor Buckland*, [*1941*] *1 A. E. R. 269* (*C. A.*).—Another question of contract affecting hire-purchase agreements arose out of an action brought on an implied warranty of fitness of the chattel. The intending purchaser had the chattel invoiced to her, but the price was paid by instalments under a hire-purchase agreement entered into with a finance company. The Court of Appeal held that no action lay on the implied warranty because the vendors had not sold the chattel to the purchaser but to the finance company. Consequently the transaction as between the purchaser and the vendor was not a contract for sale under the Sale of Goods Act, 1893, s. 14, and so there was no implied warranty of fitness. The decision is a warning in more than one sense, but it should be particularly noted that the Court relied on the particular facts of the case in determining whether or not it was a contract of hire-purchase. The form of sale in which a finance company intervenes to arrange the price, now become increasingly common, is a form of transaction the precise effect of which will require careful consideration and will no doubt lead to developments in the law.

Power of appointment—right of donee to impose restrictions on interest appointed to object—whether appointment creates the interest.—Re de la Bere, [1941] 2 All E. R. 353, arose out of an appointment made under a special power to A with a proviso that the interest should not be caught by an after-acquired property clause in a marriage settlement of the appointee. Such a question is bound to depend to some extent upon the construction of the instrument creating the power, but in this case the instrument in fact contained no expression of intention. It was argued (a) that in the absence of any intention expressed in the instrument creating the power no such intention could be effective in the appointment, and (b) that an intention expressed in the appointment not being authorised in the instrument creating the power was invalid.

Simonds, J., held that (a) the interest was created by the exercise of the power and not by the instrument creating the

power, and hence the absence of any intention in the instrument creating the power was not effective to exclude the limitation put on it by the exercise of the power, and (b) the instrument creating the power had conferred the right to appoint an absolute interest and thereby impliedly authorised the grant of a less interest and so authorised the imposition of an otherwise not invalid restriction.

The first part of his decision is of interest because in some respects the exercise of a special power is read back into the instrument creating it. Here the point taken by the learned Judge is clear : the creation of a special power confers no interest upon the objects of the power unless, of course, it is a power in the nature of a trust. The object only obtains an interest after the exercise of the power. Consequently, if the power is validly exercised the character of the interest is determined by the instrument exercising the power. In support of his contention the learned Judge cited *Re Dickinson's Settlement*, [1939] Ch. 27, where Crossman, J., held that for the purposes of section 31 of the Trustee Act, 1925, the exercise of a power was the relevant document for determining whether or not the interest was created prior to the Act, and he also cited *Re Rush*, [1923] A. C. 544; [1923] 1 Ch. 56; *Northumberland* v. *I. R. Commrs.*, [1911] 2 K. B. 1011.

Charity — recourse to capital — construction. — Re Brunner's Declaration of Trust, [1941] 2 All E. R. 745, does not really lay down any new principle, but operates as a warning on construction. A trust deed for an educational charity provided in clause 3 that the trustees might apply income in perpetuity, in clause 5 that only income should be applied for the purposes of the deed, and in clause 19 that the trustees could revoke or vary any clause other than clause 3. The trustees wished to vary clause 5 by providing that capital as well as income could be applied for the purposes of the charity. Simonds, J., held that, although clause 5 was not excluded from the effect of clause 19, it was not possible to apply capital, because so to hold would have ignored the implicit prohibition in clause 3. In the learned Judge's view clause 5 was added *ex majore cautela* but did not prevent clause 3 from bearing any other meaning than that which it naturally bore, and this was that the fund should be preserved in perpetuity.

Building society—builder's agreements—fraud.—Bradford Third Equitable Building Society v. *Borders*, [1941] 2 All E. R. 205, reverses the decision of the Court of Appeal in which it was held

that a mortgagor could recover damages from the building society on the ground of fraudulent misrepresentation in a builders' brochure, which claimed that the amount of the advance obtainable from the society was proof of the value of the house. Such a case must depend upon the precise facts, but in this case the House of Lords were not prepared to hold that the building society had itself made any false representations, nor were the builders in a position either of agents or co-adventurers with the society. In these circumstances the claim in fraud failed.

This protracted litigation will display the danger of these associations as well as the limits of these dangers. It also emphasises how much any claim of this character depends on its peculiar facts, and it is for this reason that no attempt has been made to introduce a long analysis of the decision.

Adjudication stamp—voluntary conveyance—objection to title. —*Re Robb's Contract* (noted *ante*, vol. 5, p. 296) has now been affirmed, [1941] 3 All E. R. 186, by the Court of Appeal despite the admitted practical inconveniences arising from their decision, and it is noteworthy that the learned Judges of the Court were unanimous in upholding the decision of first instance. The question at issue was whether it was necessary that a conveyance to trustees upon trust for sale, the trusts of which were declared by another instrument, should be stamped with an adjudication stamp and the Court of Appeal have held that it was so necessary. Lord Greene, M.R., founded his decision upon the point (see p. 193) that the Finance (1909–10) Act, 1910, s. 74, requires two things: "It not only enacts the charge to duty under sub-section (1), but under sub-section (2), as I have already pointed out, requires every document which falls within the definition of a 'voluntary disposition *inter vivos*' to be brought for the adjudication of the Commissioners in order to see whether or not it is chargeable with duty". The learned Judge pointed out that the definition of a voluntary conveyance for the purposes of the Act is contained in sub-section (5) which provides: "Any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary conveyance *inter vivos*. . . ." Sub-section (6) provides that certain forms of conveyance or transfer, including conveyances made for effectuating the appointment of new trustees or the retirement of a

trustee, and notwithstanding that the circumstances are not set forth in the transfer or conveyance are not chargeable with duty under the section. The fact that sub-section (6) has excluded these types of transfers from the provisions requiring duty has always been treated by practitioners and by a circular issued by the Inland Revenue Commissioners as excluding them also from the liability under sub-section (2) of obtaining an adjudication stamp. Lord Greene especially pointed out (at p. 194) that the Inland Revenue Commissioners' circular has no support in law in so far as it is inconsistent with the decision in the present case. Both Lord Greene and Clauson, L.J., emphasise that in their opinion the Legislature probably did not appreciate the burden that was being put upon the public.

In effect, therefore, the decision seems to amount to this. There is no escape from the rigour of the requirement that even though a voluntary transfer or conveyance is exempted from the requirement of *ad valorem* duty it must still be presented for adjudication unless and until the Legislature decides to alter or amend the law. To this there may be an exception pointed out by Clauson, L.J. (at p. 195) when he said : "A good deal was made of the inconvenience arising from the section if it does involve an adjudication of every transfer made for nominal consideration for the purpose of securing the repayment of an advance or loan. I think I do see a loophole here. It will be observed that a conveyance or transfer which is not a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration is to be deemed to be a conveyance or transfer operating as a voluntary disposition *inter vivos*, but it occurs to me that it may be—it is not necessary to decide it and I do not propose to say anything which can be treated as a decision—that a transfer made for nominal consideration in favour of a person who has advanced money may come within the words of exception as being a disposition made in favour of an incumbrancer in good faith and for valuable consideration. . . ."

The effect of the decision appears to be twofold. First, all such transactions must be adjudicated in future notwithstanding the absence of *ad valorem* duty. Secretaries of companies will apparently have to consider the propriety of registering a transfer of shares with a 10s. stamp but not adjudicated, for example. The additional burden on the public and on the Stamp Office may not be very welcome in the present circumstances and perhaps the Legislature may be persuaded to take immediate action.

Secondly, we meet the problem of titles. Where appointments

of new trustees, etc., appear on titles, except for the Settled Land Act, they generally operate as a transfer of the legal estate by virtue of express or implied vesting declarations. Such a transfer requires to be adjudicated. When the appointment does not operate as a transfer it does not require to be so stamped. This is the essential point to bear in mind. But where such an appointment should have been stamped and has not been there is considerable technical difficulty. Equally, of course, a conveyance to a trustee, etc., will require adjudication. Whether the difficulty is not more apparent than real remains to be seen. Although a stamp objection cannot usually be excluded by contract there is no reason why it should not be waived. As in most cases it will be quite clear that there is no further duty to be paid it may be that practitioners will see fit to waive the objection or alternatively take an indemnity against any expense which may be incurred by reason of the document being improperly stamped. If amending legislation is not passed promptly it is a matter on which the profession will have to form its practice.

One other point may be mentioned. The definition of a transfer or conveyance may require some further definition, and this is particularly the case with regard to written assents now requisite for the purpose of passing a legal estate in land. Such an assent does not, of course, attract duty by reason of section 36 (11) of the Administration of Estates Act, 1925. On the other hand, it does operate as a transfer of the legal estate *inter vivos* from the personal representative to the person entitled under the will or intestacy. It is hard to see how this falls outside the scope of the Finance (1909–10) Act, 1910, s. 74, though there is manifest objection to it so doing.

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2. *WILL CASES.*

By S. J. BAILEY, LL.M., Barrister-at-Law.

Administration—assets of deceased—benefit of covenant with deceased to make payments to members of his family—construction of covenant.—There have been a number of decisions upon the question whether moneys payable under a life or endowment policy taken out by the assured for the benefit of another form part of

the assured's estate at his death, or are to be regarded as held upon trust for the beneficiary (see Vol. III, p. 100; Vol. V, p. 309). This question turns upon the true construction of the policy—*i.e.*, did the contract by the assured with the insurers show that he was to be a trustee of the policy-moneys? *Re Stapleton-Bretherton, Weld Blundell* v. *Stapleton-Bretherton*, [1941] 3 All E. R. 5, raised an analogous question. Here two brothers, each of whom had a life interest in a certain estate, covenanted with each other to the approximate effect that on the death of either, the survivor (having the income of the estate for life) would make certain annual payments to the deceased brother's wife and children. Subsequently, one of the brothers died, and thereupon his executors contended that the payments to be made by the surviving brother should be paid direct to the deceased's estate and belonged to it absolutely. On a summons to determine the true construction of the covenants, Simonds, J., decided (following the above-mentioned line of cases) that they created no trust. The surviving brother, however, being naturally unwilling to pay to his brother's estate absolutely sums which, as was clear from his covenant, were intended to be paid direct to the widow and children of the deceased, claimed to be at liberty to fulfil his contractual obligation according to its terms by making the payments to them. He contended that, were the payments made to the deceased's estate, they would operate merely to the advantage of the deceased's creditors and legatees, whereas the contract clearly intended the money to go to the deceased's widow and children. The learned Judge, on the true construction of the covenants, held the brother to be entitled to discharge his obligation in this manner. He was able to reach this decision despite *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147, one of the above-mentioned decisions on policies taken out by the deceased for the benefit of another, where Lord Esher, M.R., had said that, on the true construction of the policy concerned in that case, the executors of the deceased were the only persons capable of giving a valid receipt for the policy-moneys. *Cleaver's Case* was distinguishable, being one where, on a true construction of the contract (*i.e.*, the policy) in the light of surrounding circumstances, the destination of the money was a matter of indifference to the covenantor (the insurance company): if such a contract nominates a third party as payee he may be regarded as a mere nominee of the covenantee who (or whose executors) may unilaterally revoke this nomination. In the present case, however, the facts showed that payment to third parties (the wife and children) was a matter of concern to both

covenantor and covenantee. Accordingly the contractual term as to the destination of the payments must stand unless both of the contracting parties agree to vary it.

(2 K. & E., p. 117, n. (*d*).)

Administration—apportionment—settled residuary gift comprising reversionary interests—Rule in Re Chesterfield's Trusts—whether applicable to realty.—Where by a residuary gift personalty is settled upon persons in succession, the rule in *Howe* v. *Earl Dartmouth* (1802), 7 Ves. 137, requires an apportionment of the income of so much of the personalty as has not been invested in authorised securities. By this means the life tenant of the residuary personalty is prevented from receiving in full any abnormally high income which is being received whilst the fund remains invested in some wasting or hazardous security. Conversely, where part of a settled residuary estate is of a reversionary nature, and is therefore as yet producing no income at all, an apportionment is made of the benefits ultimately obtained from this reversionary interest (where it is sold or falls into possession), in order that the life tenant may be compensated retrospectively for his lack of income from that property in the meantime. This latter rule is known as the rule in *Re Chesterfield's Trusts* (1883), 24 Ch. D. 643. Although it is well established that the rule in *Howe* v. *Earl Dartmouth* is not applied to *realty* comprised in a settled residuary gift (even though there be a trust for sale), there was until recently no definite authority that the rule in *Re Chesterfield's Trusts* is inapplicable to realty. This question has now been decided by Simonds, J., in *Re Woodhouse, Public Trustee* v. *Woodhouse*, [1941] W. N. 123; [1941] 2 All E. R. 265. The learned Judge felt justified in disregarding certain *dicta* to the contrary, and held that the rule (like that in *Howe* v. *Dartmouth*) applies only to personalty. The decision was based largely upon the obvious fact that the two rules are evidently complementary. It would be manifestly unfair if the rule which augments the life tenant's income (*Re Chesterfield's Trusts*) applied to realty, whilst that which reduces an undue income (*Howe* v. *Dartmouth*) does not. In the case in point a settled residuary gift included two reversionary interests belonging to the testator: one was the ultimate trust under his marriage settlement of a freehold house and certain perpetual rentcharges; the other was a reversionary

interest under a voluntary settlement of other perpetual rentcharges. These reversionary interests fell into possession (on the death of the respective life tenants) some thirty years after the testator's death. By his will the testator had devised and bequeathed the whole of his property to trustees upon trust for sale (with power to postpone sale) upon trust to pay the income of one moiety to his wife for life and of the other moiety to his sister for life, with remainders over. The effect of the decision was that the wife and sister, as life tenants under the residuary gift, had no right to claim any benefits from the freehold house and rentcharges beyond the income actually produced by the properties (or by the proceeds of their sale) after they ceased to be reversionary.

(2 K. & E., p. 878.)

Administration—executor's liability on covenants of lease—personal liability on entering into possession—fund set aside to meet contingent liability—Trustee Act, 1925, *s.* 26.—The practice of authorising executors to set aside a fund out of the estate in order to meet some future contingent liability is now rarely necessary, so far as liability on the covenants of deceased's leaseholds are concerned. This is because section 26 of the Trustee Act, 1925, gives adequate protection in such a case "where a personal representative or trustee is liable as such"—see *Re Lewis*, [1939] Ch. 232 (noted Vol. III, p. 349). Where, however, the executors enter into possession of the deceased's leasehold properties, they become personally liable on the covenants by virtue of the resulting privity of estate. In such circumstances the executors are not liable merely "as such" within the meaning of the section, which therefore gives them no adequate protection against this personal liability. Such was the decision of Simonds, J., in *Re Owers, Public Trustee* v. *Death*, [1941] W. N. 146; [1941] 2 All E. R. 589. Accordingly, the learned Judge, following the old practice of the Court, decreed that a sufficient indemnity be set aside for certain executors who, having so entered into possession, had incurred personal liability upon the covenants of various leases comprised in the deceased's estate.

(1 K. & E., p. 248, n. (*e*); 2 K. & E., p. 642, n. (*p*).)

Administration—grants ad colligenda bona—enemy interests in English estates—grants to Public Trustee—application to Court for special powers—Judicature Act, 1925, *s.* 162.—Section 162 of the Judicature Act, 1925, as amended by section 9 of the Administration of Justice Act, 1928, requires the Court to have regard, in making grants of administration, to the rights of all persons interested in the estate of the deceased. But the section expressly empowers the Court, if special circumstances exist in which such a course appears to be necessary or expedient, "to appoint as administrator some person other than the person who, but for this provision, would by law have been entitled to the grant of administration, . . . and any administration granted under this provision may be limited in any way the Court thinks fit." *In the estate of San Pietro, deceased*, and *in the estate of Van Tuyll van Serooskerken, deceased*, [1941] P. 16, were applications made on behalf of the Public Trustee, by motion in open Court, for grants of administration *ad colligenda bona*, in respect of two estates in each of which enemies (within the meaning of the Trading with the Enemy Act, 1939) were interested. Under the present law the Custodian of Enemy Property in England has no power to accept grants of administration to estates of deceased persons where enemy interests are involved; nor is the Public Trustee, as such, the custodian (though in fact Sir Ernest Fass holds both offices). In these respects the existing position differs from that of the war of 1914—1918. Although, by virtue of section 162 of the Judicature Act, 1925 (above), the Court has evidently power in such cases to make unlimited grants of administration, it appears that the Public Trustee is unwilling to seek an unlimited grant in respect of a person who dies domiciled abroad, since questions of foreign law are then likely to arise. Counsel stated, however, that the Public Trustee is willing, in such cases, to accept grants *ad colligenda bona* where no other representation can be obtained and enemy interests are involved. Sir Boyd Merriman, P., approved of this proposal, and ruled that in such circumstances simple grants *ad colligenda* might in future be obtained by the Public Trustee direct from the Principal Probate Registry. Where, however, the application asks for special powers, the appropriate procedure is by motion in open Court. Each of the present applications sought special powers beyond those (of collecting and preserving the property) which are normally incident to grants *ad colligenda*; and in each case the Court, under the wide terms of section 162 of the Act of 1925, acceded to the application. In the one case the widow of an Italian died intestate, and certain English solicitors (acting for her children in Milan) incurred certain

costs with a view to obtaining administration, and made disbursements in respect of estate duty. Italy then entered the war. The Public Trustee was empowered to reimburse the solicitors both for the above outgoings and for the costs incidental to the present application. On the other motion the decision went rather further. The deceased, a domiciled Dutch subject resident in England, had bequeathed English property to his widow for life with remainder to various beneficiaries who included his children and his executor, resident in Holland. London solicitors, acting for the executor, had incurred certain costs and paid estate duty before the subjugation of Holland. The Public Trustee was again empowered to reimburse them for this and for the costs incidental to the present motion. He was empowered, moreover, to reimburse to various persons payments they had made in respect of the deceased's debts in this country and, further, to pay to the widow the income of the English property for her life. The authority thus to pay income to the widow, however, was given subject to the consent of the Trading with the Enemy branch of the Treasury and the Board of Trade.

Administration—incidence of pecuniary legacies upon residuary gift—exoneration of residuary realty—construction—Administration of Estates Act, 1925, *s.* 34 (3) *and Part II of First Schedule.*—Before 1926 the rules of administration which fixed the order in which the various items comprising the assets of a deceased person were applied towards the payment of his debts were almost entirely case law; so also were the rules which decided from what assets any pecuniary legacies should be paid. By these rules, it will be remembered, the deceased's residuary personalty (to the exoneration of his realty) was primarily liable for his debts and was ordinarily the only source from which to satisfy any pecuniary legacies he had bequeathed by his will. The Administration of Estates Act, 1925, was thought to have removed this pre-eminence of the deceased's realty and to have placed it on the same footing as his personalty both in liability for debts and as a source for the payment of pecuniary legacies. In fact, however, the actual words of the Act appear to be directed only towards its liability for the deceased's debts: section 34 (3) enacts that the deceased's real and personal estate shall (subject to the provisions of his will) be applicable towards the "debts and liabilities payable thereout" in the order mentioned in Part II of the First Schedule to the Act. Nevertheless, the order prescribed by the schedule states that "a

fund sufficient to meet any pecuniary legacies " should be reserved from the " property " (whether undisposed of or comprised in a residuary gift) which is made primarily available for the payment of the deceased's debts; and this fund is to be preserved against the incidence of his debts in priority to all other property of the deceased except property specifically devised or bequeathed (which comes last on the list). The fact that this fund for pecuniary legacies is required by the schedule to be retained out of the deceased's " property " (whether undisposed of or comprised in a residuary gift), appears to imply that both the personal and the real property (undisposed of or residuary) must together bear the pecuniary legacies and should do so rateably. Such an innovation was to be expected from the Property Acts, whose known purpose was to assimilate the law of realty and personalty—see *Theobald on Wills* (9th ed., p. 692). Yet, in *Re Thompson*, [1936] Ch. 676, one of the alternative grounds of Clauson, J.'s decision was that the acts do not alter the pre-1926 rules whereby pecuniary legacies were payable ordinarily out of residuary personalty alone, and even if the residuary personalty was not sufficient, the residuary realty would not be used to supply the deficiency unless the will expressly or by implication charged the pecuniary legacies upon it. In only one case under the pre-1926 law was residuary realty liable to contribute rateably with residuary personalty to produce pecuniary legacies, namely, where the will treated the residue as a *mixed fund* and directed the legacies to be paid out of it : see *Re Boards*, [1895] 1 Ch. 499. The learned Judge took the view that since Part II of the First Schedule to the Act of 1925 professed to be dealing with the incidence of debts and liabilities upon the various assets of the deceased, it cannot operate to alter the incidence of pecuniary legacies thereon.

This decision meant, of course, that where a will contains certain devises and bequests (including pecuniary legacies) and disposes of the residuary personalty to P and the residuary realty to R, the pecuniary legacies must ordinarily abate in so far as the residuary personalty cannot meet them. It meant also that the pecuniary legacies fall solely upon P's gift and in no way affect the gift of residuary realty to R. In view of the fact that the actual decision in *Re Thompson* could be supported on a different ground, one had hoped that subsequent decisions might feel able to ignore this aspect of it. Unfortunately, however, it has now been followed by Farwell, J., in *Re Rowe*, *Bennetts* v. *Eddy*, [1941] W. N. 124; [1941] 2 All E. R. 330. There the testator had given certain pecuniary legacies and concluded, " I devise all my real estate and bequeath all the residue of my personal estate to A and B in equal

shares". The personal estate was insufficient to provide the pecuniary legacies. The learned Judge held (i) that the Act of 1925 has not altered the old rules as to the incidence of pecuniary legacies, (ii) that the realty and personalty were not here constituted a mixed fund, on the construction of the will, and (iii) that, although the gift of personalty here was residuary, the gift of realty (in the same direction) was, on the construction of the will, specific. Accordingly, the pecuniary legacies abated in so far as the residuary personalty was inadequate to provide for them. It will be observed that (iii), above, would in itself be a sufficient reason for the decision, even if the Act of 1925 had in fact altered the law so as to make residuary realty liable rateably with residuary personalty to provide for pecuniary legacies. Nevertheless, to revive the ancient mystery whereby a general gift of realty is regarded as "specific" seems unnecessary in modern times, and may unduly complicate the interpretation of Part II of the Schedule to the Act. It would seem possible, moreover, that the learned Judge might have justified his decision from an entirely different angle; and it is conceivable that this point is implied in his judgment. A gift of "*all* my real estate and the *residue* of my personal estate", following bequests of pecuniary legacies, might be construed as showing a clear intention to throw the pecuniary legacies upon the personal estate and to exonerate the real estate entirely.

[The Weekly Notes report does not give point (iii) of the decision.]

(2 K. & E., p. 859, n. (*l*).)

Construction—bequest of fixed sum to each member of a class —rule in Rogers v. *Mutch*.—Unless the will shows a contrary intention, a class gift to be shared among the members of the class admits members born after the testator's death but before the period of distribution. This convenient rule of construction is not applied, however, where the gift is of a fixed sum to each member of a named class. In such a case it is more convenient, in administering the estate, to know at once how many members are to benefit; for otherwise the executor will not know how much of the assets must be set aside for them. The rule of construction, therefore, which has been adopted where the gift is of a fixed sum to each member is that only those living at the testator's death are included: see *Hawkins on Wills* (3rd ed.), p. 93, and *Rogers* v. *Mutch* (1878), 10 Ch. D. 25. This rule was applied by the Court

of Appeal recently in *Re Bellville, Westminster Bank, Ltd.* v. *Walton*, [1941] W. N. 145; [1941] 2 All E. R. 629, where £10,000 had been bequeathed to each of the daughters of the testator's nephew, A, "who shall be born after the date of this my will and who shall be born before any further son born to my nephew". The question arose whether a daughter of A, conceived and born after the death of the testator, could benefit under this gift. In the Court below, Farwell, J., took the words to mean, at their face value, that she should be included, but found in the remainder of the will an overriding intention to exclude those born after the death of the testator. On appeal, however, this decision was affirmed on another ground, namely, the above rule of construction whereby those born after the death of the testator are excluded from such a gift unless the will shows an intention to the contrary. The only other daughter of A was also excluded, by the terms of the gift; for she had been born before the will was made. In reaching their decision, the Court of Appeal incidentally noted that an established exception to the rule in *Rogers* v. *Mutch* exists where, the testator having set apart a fund out of which alone the legacies concerned are to be paid, the admission of after-born members of the class causes no inconvenience in administering the remainer of the estate.

(2 K. & E., p. 889, n. (*m*).)

Construction—uncertainty of subject-matter—implied power to select—order of selection among legatees—selection by lot.—If a testator, in making a gift, describes the donee or the gift in a manner which is equally applicable to two or more persons or things the gift may fail for uncertainty, unless the equivocation disappears in the light of the admissible evidence—*e.g.*, *Richardson* v. *Watson* (1833), 4 B. & Ad. 787. If, however, the testator, having several properties of the same description, gives one to a legatee leaving to him the right to select between them, the gift is clearly valid. Moreover, in *Asten* v. *Asten*, [1894] 3 Ch. 260, it was said by Romer, J., that a power of selection may be inferred by the Court (whether the fact that there are several properties is indicated by the will or appears *aliunde*), unless there is something in the will to indicate that the testator had in mind a particular (though unidentified) one of the properties. The learned Judge stated further that he himself would be prepared to decide, where one of such properties is so given to each of several legatees, that each legatee should, in turn, have power to select according

to the priority of his bequest. On the facts of that particular case, however, the gifts failed, since the words of the will suggested that the testator had intended some particular (but insufficiently identified) property for each legatee. These *dicta* have now been followed by Simonds, J., in *Re Knapton*, *Knapton* v. *Hindle*, [1941] W. N. 151; [1941] 2 All E. R. 573, where the words of the will were: "I give and bequeath my estate as follows: . . . one house to each of my nephews and nieces and one to N and one to F one to my sister one to my brother. . . ." But here the order in which the beneficiaries were named could not entirely serve as an indication of the order in which they were to select from among the houses of the testatrix; for the "nephews and nieces" were not (*inter se*) named in any particular order of priority. The learned Judge therefore put counsel to their Roman law (as a historical basis of some of the testamentary law of England) and assistance was ultimately found in the *Institutes of Justinian* (Bk. II, Tit. 20, s. 23) whereby "fortune is to be judge of the choice, and the case is to be finally settled by lot". True, this was not a precise analogy, since it appears to have applied only when a power of selecting a legacy was given in co-ownership to several legatees who failed to agree upon a joint selection. Nevertheless, the learned Judge felt able to pursue the analogy in the present case. He held accordingly that the gifts were valid; that the nephews and nieces were to choose first, followed in order by N, F, the sister and finally the brother; that the nephews and nieces should have priority of choice among themselves as they may agree, and, failing agreement, as determined by lot. The precise method of "lot" to be adopted was not specified (in *Duckmanton* v. *Duckmanton*, 5 H. & N. 219, a coin was spun, but it is not clear that this had the approval of the Court). The parties, however, were given "liberty to apply in regard to the determination by lot", and one cannot but feel that such an application should have its lighter moments.

Maintenance—Inheritance (Family Provision) Act, 1938—*conditional order for maintenance—effect of contractual obligation to devise or bequeath property in a different direction.*—Applications by "dependants" for maintenance under the Inheritance (Family Provision) Act, 1938, in so far as they often turn upon the circumstances of the parties in each particular case, are seldom likely to merit detailed consideration in these notes. The short report of *Re Hills*, *Hills* v. *Foote*, [1941] W. N. 123, is perhaps worthy of

attention as an indication that the Court is beginning to make full use of its power to impose "conditions or restrictions" upon an order for maintenance under that Act (sub-section 1 of section 1). The widow of a testator who had bequeathed substantially the whole of his estate (gross value approximately £4,724) to trustees upon trust for his four children at twenty-one, with powers of maintenance and advancement, was awarded by Morton, J., two-thirds of the actual income during widowhood; and the order expressly preserved the powers and duties of the trustees with regard to the retention or realisation of the trust property—perhaps in order to ensure that this interposition of a life interest for her in the residuary estate should not raise any questions of apportionment of the *Howe* v. *Dartmouth* type as regards so much of the estate (approximately £3,000) as was personalty. The order also imposed a somewhat complicated condition that she should inform the trustees on acquiring any property of her own (with various exceptions). Conditions of this type—intended presumably to facilitate subsequent applications for a reduction in the amount awarded (see section 4)—have been imposed in several previous cases. Although the report indicates that the widow desired to maintain a home for the children (one of whom was already of age), it appears that the order made was not conditional upon her doing so, nor upon her providing support for them; and it would seem from the report that the order did not explicitly preserve the power of the trustees to maintain or advance the children out of their prospective shares.

The decision of the Judicial Committee of the Privy Council, in *Dillon* v. *Public Trustee of New Zealand*, [1941] 2 All E. R. 284, brings to mind the question whether the Court's power to order maintenance for a "dependant" under the Inheritance (Family Provision) Act, 1938, is ousted if the deceased's will was made in pursuance of a valid contract by him to bequeath his property in a particular direction. Their Lordships' decision in this case concerned the Family Protection (New Zealand) Act, 1908, whereby the Courts of New Zealand have powers analogous to those given in this country by the Act of 1938. Their Lordships held (at p. 288), overruling the decision of the Court of Appeal in New Zealand, that "the contract cannot oust the jurisdiction of the Court, and there is nothing in the Family Protection Act, 1908, s. 33, which restricts the Court's power to re-distribute the estate in cases where the provisions in the will are a fulfilment of a contract entered into *inter vivos*". Moreover, their Lordships held that the existence of such a statute means that the measure of damages for failing, in breach of contract, to devise property

to A is not necessarily the value of that property : the true measure is the value of that property less so much of it as the Court, had the devise been made, would have distributed among the deceased's dependants as empowered by the statute. On this reasoning one cannot say that the Court diminishes A's rights when it orders the property, or part of it, to be applied for the maintenance of a dependant. It is rather doubtful whether a similar decision would be reached where a dependant seeks *under English law* an order for maintenance out of property which the deceased, in fulfilment of a contract, devised to A. Section 5 of the Act of 1938 defines the testator's " net estate ", out of which maintenance can be ordered, as " all the property of which a testator had power to dispose by his will . . . less the amount of his funeral, testamentary and administration expenses, debts and liabilities and estate duty payable out of his estate on his death ". Apparently the problem will turn on the true construction of the word " liabilities " in this definition. If the value of property which one has contracted to devise in a particular direction constitutes a " liability " within the meaning of the Act, an order for maintenance cannot affect it. Before the Act came into force such a contract in English law undoubtedly created a contractual liability to the extent of the value of that property (see *Synge* v. *Synge*, [1894] 1 Q. B. 466, C. A.); it would seem to follow, therefore, that such a contract operates *pro tanto* to exclude the power to order maintenance under the Act of 1938.

(2 K. & E., p. 886, n. (*y*).)

Probate—construction—revocation—limits of Court of Probate's jurisdiction in matters of construction.—It was decided in *Re Hawksley's Settlements*, [1934] 1 Ch. 384, that when a Court of Probate, in the course of its functions (*e.g.*, determining whether a document constitutes a valid will) expresses an opinion as to the meaning to be placed upon the words of a testamentary instrument, that opinion, though binding on the question whether probate should be granted, is not binding upon a Court of Construction if the interpretation of the will is subsequently considered there. *In the estate of Fawcett*, [1941] W. N. 152; [1941] 2 All E. R. 341, raised this point afresh, and Langton, J., applied the above rule. Apparently it was even argued that he had no jurisdiction to deal with a matter of construction, although (sitting in the Probate Division) he had before him the questions whether the disputed document should be admitted to probate and whether it effectively

revoked an earlier will. He answered both questions in the affirmative. On the question of revocation he found in the second will sufficient evidence of intention to revoke the first one and was satisfied, moreover, that the testatrix intended it to dispose of the whole of her small estate. "A court of construction may well say that she has not succeeded, but I am concerned with her intention only." The learned Judge clearly felt it to be his duty to urge the parties to accept this, without the further expense of an application to the Chancery Division. And perhaps one may add, with all due respect, that the persistence of this dual jurisdiction in construction can hardly commend itself to persons interested in an obscure will concerned with a small estate. In the present case the testatrix, seriously ill, wrote in pencil a holograph will. The learned Judge pronounced in its favour (and against an earlier will). Its operative words were, "All else to be sold and the proceeds after the debts, etc. Barclays Bank will do this to Emily Thompson and any money I may have in the bank". Despite their obscurity, these words were held to appoint the bank executor and to show an intention to carry the whole of her property.

Probate—soldier's will—"in actual military service"—whether includes service in England—Wills Act, 1837, *s.* 11.—A recent decision of Henn Collins, J. (noted *ante*, vol. 5, p. 315), left in some doubt the question whether a soldier stationed in this country has the privilege of making an informal will. The decision concerned was *In the goods of Gibson*, [1941] 2 All E. R. 91, where his Lordship held that an officer in the Army Dental Corps living in his own house in the vicinity of army headquarters to which he was attached, was not so privileged; and the judgment appeared to stress the points (1) that the deceased, though a soldier, was carrying out peace-time duties, and (2) in particular that he was not "parted from civil surroundings". A similar question has now arisen before Hodson, J., in *In the Estate of Spark*, [1941] 2 All E. R. 782; and here the decision indicates that whatever force point (1) may have, point (2) is not at the present time a relevant consideration. The deceased, Spark, had been killed by an enemy bomb while he was in camp in England. When mobilised as a Territorial soldier in 1939 he had instructed his solicitor to prepare a will in favour of his wife, intending to execute it when next on leave—but he never in fact executed it. A year later, while he was in camp with his unit, he said to a fellow soldier: "I wish my wife to have all I have in case I get killed". He was killed

within a few days after making this statement. Hodson, J., held that this statement was a sufficient testamentary act and that the deceased was sufficiently "in actual military service", within section 11 of the Wills Act, 1837, to enjoy the privilege of making an informal will. The learned Judge did not expressly refer to *Gibson's Case* (*supra*). He did refer, however, to a *dictum* of Sir Francis Jeune, P., in *In the goods of Hiscock*, [1901] P. 78, and concluded that although the basis of the soldier's privileged will was that he has not, as a rule, a solicitor at his elbow (*i.e.* is "*inops consilii*"), yet this is not an essential factor in establishing the privilege for individual cases. Moreover, despite the emphasis laid by earlier decisions on the question whether a soldier-testator in England was under orders to proceed overseas, the learned Judge decided that the scope of modern warfare is so much enlarged that "a soldier who is in camp (even though he is in England and not under orders to proceed overseas) is thereby a mark for enemy action, and is in a position in which he is in actual military service within the meaning of the section" (at p. 784). It would seem that this decision extends the scope of "actual military service" so as to enable a soldier stationed in this country to make a privileged will if at the time of making it he is with his unit. Whether such a soldier could make an informal will when on leave from his unit has yet to be decided.

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3. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, LL.M., Barrister-at-Law.

Liability of tenant for nuisance—accumulation of snow.—The liability of the tenant in occupation for a nuisance on the demised premises which causes injury to passers-by on a highway is illustrated by *Slater* v. *Worthington's Cash Stores (1930), Ltd.*, [1941] 3 All E. R. 28. The liability in respect of a nuisance on the demised premises falls as a rule on the tenant in occupation (*Woodfall*, 24th ed., p. 818; *The Conveyancer*, Vol. 5, p. 102), and he is liable even though the nuisance has been created without any act, authority or permission on his part if, with knowledge or means of knowledge of its existence, he has suffered it to continue without taking reasonably prompt and efficient means for its abatement: *Sedleigh-Denfield* v. *St. Joseph's Missions*, [1940] A. C. 880, and see *Woodfall*, 24th ed., Cumulative Supplement No. 2, p. 63. In *Slater* v. *Worthington's Cash Stores (1930), Ltd.*, the nuisance consisted of an accumulation of snow on the

roof; on account of the severity of the storms the defendant (who was tenant in occupation) was deemed to have had knowledge of this, but for four days prior to the accident failed to take any steps to abate it. The defendant company was accordingly liable both in nuisance and negligence.

Assignment of lease—assignee's covenant to pay the future rent—whether covenant absolute to pay the rent or merely one of indemnity.—In *Butler Estates Co., Ltd.* v. *Bean* (1941), 57 T. L. R. 666, an important question arose as to the extent of an assignee's liability on a covenant to pay the future rent. The essential facts relevant to this issue were that lessees assigned their term to the defendants, who entered into an express covenant "to pay the future rent and observe the covenants on the part of the lessee contained in the said lease". The original lessees assigned to the landlords the benefit of this covenant. The defendants assigned over to a company which made default in its payment of rent. The landlords did not sue this company but brought an action against the defendants on their covenant. It was contended that the defendants' covenant was merely one of indemnity, but this view was rejected by the Court of Appeal, who, upholding the decision of Lawrence, J., in the same case (57 T. L. R. 615), held that the covenant was an absolute one to pay the rent and that the defendants were liable accordingly.

Now in its usual form the covenant by the assignee is to pay the rent and observe the covenants on the part of the lessee contained in the lease and to keep the assignor and his representatives effectually indemnified against all actions, claims, etc., on account of the non-payment of the rent or the breach of the covenants: see *Woodfall*, 24th ed., p. 843, and *Key & Elphinstone*, 14th ed., Vol. 1, p. 621. It is settled that the object and effect of this, the usual form of covenant, is to indemnify and protect the assignor against claims for rent or breach of covenant: *Harris* v. *Boots, Ltd.*, [1904] 2 Ch. 376. But this case was distinguished by the Court of Appeal in *Butler Estates Co., Ltd.* v. *Bean*, on the ground that in the latter case the covenant stopped after obliging the assignee to pay the rent and observe the covenants, whereas in the usual form, upon which the rule of construction laid down in *Harris* v. *Boots, Ltd.* is based, the covenant goes on expressly to indemnify the assignor against all claims. Scott, L.J., says, in regard to the covenant in the *Butler Estates Case*, "It has no reference to indemnity, and it is clear in its terms, which expressly put on the defendants the obligation to pay the future

rent and observe the covenants on the part of the lessee contained in the said lease ".

It is therefore in the interests of the assignee to have the full covenant in the usual form mentioned above. Actually an assignment expressed to be made by the assignor as beneficial owner now implies a covenant of indemnity in the usual form, by virtue of section 77 of the Law of Property Act, 1925, though if there is no money consideration the covenant should be set out : see *Key & Elphinstone*, 14th ed., Vol. 1, pp. 619, 621.

Another and quite distinct point arose in *Butler Estates Co., Ltd.* v. *Bean*. The landlords made a claim in the liquidation of the lessee company for possible loss of future rent (see *Woodfall*, 24th ed., p. 331), which the liquidator ultimately settled for the comparatively small sum of £530. It was suggested that the defendants, if held liable for the rent under their covenant, were entitled to credit for this sum; but this contention was rejected by the Court of Appeal because the sum paid under the compromise was in respect of possible loss over the whole period of future rent and could not be regarded as a payment towards any individual quarter's rent.

Notice to terminate in accordance with proviso in lease—meaning of "the end of the last quarter of this year".—In *Winchester Court, Ltd.* v. *Holmes* (1941), 57 T. L. R. 595, a lease for seven years from January 1, 1937, contained an option for the tenant to determine the tenancy at the end of the third year on giving at least six months' notice. On June 30, 1939, the tenant wrote to the landlords stating that he gave them "formal notice of termination at the end of the last quarter of this year". The question arose whether this was an effective notice, it being contended on behalf of the lessors that the notice purported to determine the lease on December 25, 1939, which it could not validly do.

Of course, if the clear meaning of the notice had been to determine at December 25, 1939, and not on January 1, the notice would have been bad : see *Cadby* v. *Martinez* (1840), 11 A. & E. 720; *Doe* v. *Morphett* (1845), 7 Q. B. 577, and other cases cited in *Woodfall*, 24th ed., pp. 971 to 977. Equally the notice would have been bad had it been incurably ambiguous and not *quod certum reddi potest* : *Gardner* v. *Ingram* (1889), 61 L. T. 729; *Phipps & Co., Ltd.* v. *Rogers*, [1925] 1 K. B. 14. But where the meaning of the notice is clear, although the language used to express that intention is defective and technically incorrect, the

tendency of the Courts has been to validate the notice by deviating from strict law and reading it in such a way as to avoid the literal construction which could not possibly have been intended : *Doe* v. *Smith* (1836), 5 A. & E. 350; *Doe* v. *Kightley* (1796), 7 T. R. 63; *Wride* v. *Dyer*, [1900] 1 Q. B. 23. In *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378, Lord Halsbury said : " The validity of a notice to quit ought not to turn on the splitting of a straw." Nevertheless, had the notice in *Winchester Court, Ltd.* v. *Holmes* been a notice to quit in the proper sense of the word it is doubtful whether the authority of the above cases, where an *impossible* literal construction was rejected, would have been sufficient to validate such a notice as this which, viewed as a notice to quit, leaves open a serious doubt as to whether December 25 is not intended. But in this case the notice was not a notice to quit. It was, and was expressly worded as, a notice to determine the tenancy in accordance with the proviso in the lease. Both parties had the lease before them, and reference to that instrument must have made it clear that, in relation to the lease, " the end of the last quarter of this year " meant January 1, 1940.

Accordingly Stable, J., held that the notice was valid, stating as the reason for his decision : " In my opinion the clear construction of this notice is as follows : It is expressed to be a formal notice of termination, which means a notice of termination in conformity with those provisions in the lease which create and define the right which by the notice it is expressly sought to exercise. And the notice says that the lease is to be determined ' at the end of the last quarter of this year '. I construe that to mean at the end of the last quarter of the third year of the tenancy. What else can ' this year ' mean ? "

The case raises an interesting point of construction, which should be noted in connection with the paragraph on the form of such notices on p. 986 of *Woodfall*, 24th ed. It may be observed that the use by the lessee of the form of notice given on p. 1329 of *Woodfall* entirely obviates all difficulties of the kind which arose in this case.

Landlord and Tenant (War Damage) Act, 1939—whether superior landlord proceeding under Law of Distress Amendment Act, 1908, s. 6, thereby becomes " landlord " within the Act—effect of notice of disclaimer on rent payable in advance.—Two important points under the Landlord and Tenant (War Damage) Act, 1939, are decided by the Court of Appeal in *Hildebrand* v. *Lewis* (1941), 57 T. L. R. 607.

The intermediate landlord fell into arrears with his rent, so the superior landlord served a notice on the sub-tenant under section 6 of the Law of Distress Amendment Act, 1908, requiring him to pay his rent direct to the superior landlord (*Woodfall*, 24th ed., p. 414). The premises were damaged by enemy action, and the sub-tenant served on his immediate landlord a notice of disclaimer under section 4 of the Landlord and Tenant (War Damage) Act, 1939 (*Woodfall Supplement, No.* 2, p. 32). To this the immediate landlord made no reply, but the superior landlord served on the sub-tenant a notice to avoid disclaimer under section 4 (5). Such a notice is of no effect unless served by the landlord, and by section 24 " landlord " means the person who under the lease is, as between himself and the tenant, for the time being entitled to the rents and profits of the demised premises payable under the lease. The superior landlord had no title to the rents and profits save under the Law of Distress (Amendment) Act, 1906. Accordingly a notice served by him on the sub-tenant was of no effect.

As no effective notice to avoid disclaimer was served, the result under section 8 of the Act was that the sub-lease was deemed to have been surrendered as from the date when the notice of disclaimer was served. Beyond what is inferred in this enactment, the section makes no provision as to rent. In this case rent was payable quarterly in advance and one quarter's rent had fallen due on September 29. The surrender took effect as from October 22. A personal covenant for rent previously due is not affected by the surrender (see *Woodfall*, 24th ed., p. 906; *Att.-Gen.* v. *Cox* (1850), 3 H. L. C. 240), and accordingly there is no room for the application of the Apportionment Act, 1870 : compare the case of rent *accruing* at the time the surrender was made. The superior landlords were therefore entitled to recover the whole of the quarter's rent due on September 29.

Comparison should be made with section 11 of the same Act (effect of notice to avoid disclaimer), which contains a direct provision for the suspension of rent in that case for an apportioned period : see *Turner* v. *Stella Bond, Ltd.* (1941), 57 T. L. R. 395; *The Conveyancer*, Vol. 5, p. 306.

Reference should also be made, as to this and other points of interest arising under section 8 of the Act, to the discussion of the section in Supplement No. 2 to *Woodfall*, 24th ed., at pp. 34 to 36, where it is pointed out in another connection that the lessee remains liable on his personal covenant for the rent which accrued before the surrender.

Landlord and Tenant (War Damage) Act, 1939—meaning of "multiple leases".—By section 24 of the Landlord and Tenant (War Damage) Act, 1939, a "multiple lease" is defined as meaning a lease comprising buildings which are used or adapted for use as two or more separate tenements (see *Woodfall*, 24th ed., Cumulative Supplement, No. 2, p. 39). In *Hazel* v. *Edwards* (1941), 57 T. L. R. 609, the Court of Appeal has decided a question of vital importance on the construction of this section (it may be noted that leave to appeal to the House of Lords was given).

The lease was of a single hereditament, but the tenant, there being no covenant to the contrary in the lease, sublet a portion for use as a separate tenement. Undoubtedly this made the building one which was "used or adapted for use as two or more separate tenements". But in the view of the Court of Appeal the original lease of a single hereditament was not thereby turned into a multiple lease. In the opinion of the Court "used or adapted for use" must have relation to the use or adaptation for use contemplated at the time of the granting of the lease (or licence, if the tenant had applied for a licence to convert what had hitherto been one house or other kind of single tenement into a number of flats or suites). So the letting of a block of flats or offices, obviously adapted and designed to be let to separate tenants, would be a multiple lease. And the grant of a licence as above mentioned would then convert a lease into a multiple lease. But the mere subletting of part by the tenant as a separate tenement did not have that effect.

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4. *INCOME TAX CASES.*

By LEONARD STEIN, Barrister-at-Law.

[The decisions selected for notice are not necessarily those of the greatest importance from the standpoint of the income tax practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Australian trust — life interest subject to annuity — whether income arises from securities or from foreign possessions.—As everyone knows, it was decided in *Archer-Shee* v. *Baker*, 11 T. C. 747, that where an individual is the life tenant of a trust fund, the true view, in a case in which English law applies, is that the life tenant's income arises from the securities constituting the trust

fund, his right being a right to the dividends themselves—"an equitable right in possession to receive during [his] life the proceeds of the shares and stocks of which [he] is tenant for life" (*per* Lord Wrenbury at p. 779). Whether this applies only to cases in which the individual is entitled to the whole income of the trust fund, or whether it also applies even where there are other parties having an interest in the fund, was the hitherto unsettled question considered in *Nelson* v. *Adamson*, 20 A. T. C. 105. The trust was an Australian trust. X was life tenant, subject to an annuity payable to Y. The trustees were entitled to a percentage of the income for their services. It seems clear that the law of Australia is, or was taken to be, the same as the law of England, so that there was no room for such questions as arose in the second *Archer-Shee Case*, 15 T. C. 693, out of the distinction between the law of England and that of some, at all events, of the States of the American Union. The life tenant's contention was that her income arose from a foreign possession, *viz.*, her rights under the Australian trusts, the decision in the first *Archer-Shee Case* being—so she argued—inapplicable, since it turned on the fact that the whole income was payable to the life tenant, whereas here the interposition of the annuitant (to say nothing of the trustees' remuneration) made the two cases clearly distinguishable. This view of the *Archer-Shee* decision was not accepted by Lawrence, J., who held that, notwithstanding the interposition of the annuity and the trustees' remuneration as charges on the income of the trust fund, the life tenant's income arose, none the less, from investments, and not from a foreign possession. Though the decision may be found to have implications beyond the point immediately at issue, it has not the practical importance which it would have had but for the enactment of section 19 of the Finance Act, 1940, which drastically cuts down the classes of foreign income taxable on a remittances basis. Where income arises from a foreign trust, it will now make no difference whether it arises from investments or from an equitable right to require the due administration of the trust. The effect of section 19 of the 1940 Act is that in the latter no less than in the former case tax will be chargeable on the income arising to the individual, whether remitted to the United Kingdom or not.

Settlement in favour of children—whether for less than life of child—Finance Act, 1922, *s.* 20 (1) (*c*).—Section 20 (1) (c) of the Finance Act, 1922, which relates to settlements in favour of children,

has, by sub-section (11) of section 21 of the Finance Act, 1936, ceased to have effect as respects any settlement to which section 21 applies. That section does not, however, apply to settlements made before April 22, 1936, which immediately before that date were irrevocable. So far as such settlements are concerned, questions may still arise under section 20 (1) (c) of the 1922 Act, and such a question did arise in *Whigham* v. *C. I. R.*, 20 A. T. C. 93. The settlement in that case provided that the child's rights would determine if he ceased to be a British subject or attempted to alienate his interest in the trust fund. Citing the well-known decision in *Watson's Trustees* v. *Wiggins*, 17 T. C. 728, Lawrence, J., pointed out that the real effect of the relevant provisions of the settlement was not that the income should be payable to the child *until* the happening of certain events, but that the income should be payable to the child during his life, subject to defeasance on the happening of certain events. Holding this distinction to be decisive, the learned Judge decided that the settlement was not caught by section 20 (1) (c).

Surtax—settlement—Finance Act, 1938, *ss.* 38 (3) *and* (4).—The effect of section 38 (4) of the Finance Act, 1938, is that, for the purposes of section 38 (3) which deals with undistributed income arising under a settlement, the settlor is to be deemed to "have an interest" in the settlement if any benefit is or may be derivable from the settlement by the settlor or the wife or husband of the settlor, in any circumstances whatsoever. In *Gaunt* v. *C. I. R.*, [1941] 2 All E. R. 82 (see *The Conveyancer*, June, 1941, at p. 319) Lawrence, J., held that a settlor was not to be deemed to "have an interest" by reason only of the fact that his wife would or might benefit after his death, *i.e.*, after she had ceased to be his wife and had become his widow. This decision has now been reversed (1941 T. R. 127) by the Court of Appeal, which took the view that the word "wife" must be construed as simply identifying the individual for the time being satisfying that description, and that if a benefit would or might be obtained by that individual, it was immaterial that it would only be obtainable after the settlor's death.

Surtax—settlement—Finance Act, 1938, *s.* 38 (2).—In *C. I. R.* v. *Morton*, 20 A. T. C. 5, the Court of Session dealt with a number of questions arising under sub-section (2) of section 38

of the Finance Act, 1938—the sub-section concerned with cases in which some person has power to revoke or otherwise determine a settlement or any provisions thereof and, in the event of the exercise of that power, the settlor, or the settlor's wife or husband, will or may become beneficially entitled to the whole or part of the property comprised in the settlement or of the income of that property. By section 41 (4) (b) of the Act, the expression "settlement" is defined as including (*inter alia*) "any . . . arrangement". In *C. I. R.* v. *Morton*, above, the facts were that X and his wife had transferred certain property to a private company with an issued capital of £308,000, of which £233,000 consisted of preference shares allotted to X and his wife, and £75,000 of ordinary shares allotted to their son and to trustees for their daughters. Each share carried one vote on a poll. On a winding-up the holders of the preference shares were entitled to repayment of capital and the holders of the ordinary shares to the balance (if any) of the surplus assets. On these facts it was held that the requirements of section 38 (2) were satisfied. First, it was decided that the whole transaction was an "arrangement" constituting a "settlement" within the meaning of section 41 (4) (b), and that in relation to that "settlement" X and his wife were the settlors, since they were plainly the persons "by whom the settlement was made" within the definition in section 41 (4) (b) and (c). Next it was held that the power to put the company into liquidation (which, by virtue of their voting-power, was exercisable by X and his wife) was a power to determine—not, perhaps, the whole settlement, for it would not determine the trusts in favour of the daughters—but certainly a provision of the settlement, of which the memorandum and articles of association of the company were a part. Thirdly, it was held that "the property comprised in the settlement" consisted of the whole capital assets of the company, and that, since the assets available for distribution to the members on a winding-up might not exceed in value the amount to which the preference shareholders, *viz.*, X and his wife, would be entitled by way of repayment of capital, the exercise of the power of determination *might* result in X and his wife becoming entitled to the whole of the property comprised in the settlement. It followed that the whole of the "income arising under the settlement" must be treated as the income of X and his wife.

Surtax—settlement in favour of children—Finance Act, 1936, *s.* 21.—The provisions of section 21 of the Finance Act, 1936, which deals with income settled on children, are, by virtue of

sub-section (10) of that section, inapplicable to any settlement made or entered into before April 22, 1936, "which immediately before that date was irrevocable". In *C. I. R.* v. *Lord Glenconner*, [1941] T. R. 159, the material facts were that, by a deed of covenant dated December 10, 1935, Lord Glenconner, on the dissolution of his marriage, covenanted (*inter alia*) to pay to Lady Glenconner an annual sum of £750 for the maintenance of their son, A, the payments to continue during the joint lives of Lord Glenconner and A, but with the proviso that if A should attain the age of twenty-three, or if Lady Glenconner should die before A had attained that age, then Lord Glenconner might "revoke or determine one half or any less part" of the annual payment. Another annual sum of £750 was payable, subject to a like qualification, for the maintenance of another son. So far as one half of each of the two sons of £750 was concerned, the settlement was admittedly a settlement made before April 22, 1936, which immediately before that date was irrevocable, and was consequently outside the scope of section 21 of the 1936 Act by virtue of sub-section (10). As to the other half, the Crown contended that section 21 applied. Lord Glenconner's reply was that the settlement as a whole was within the exception in sub-section (10), since on April 22, 1936, Lady Glenconner was living and both A and B were under twenty-three, so that the power to reduce the annual payments could not be exercised and the settlement was, therefore, a settlement which was in fact irrevocable immediately before April 22, 1936. This reasoning did not prevail with Macnaghten, J., who held that the distinction drawn by sub-section (10) was simply a distinction between revocable and irrevocable settlements, and that a revocable settlement was not, for this purpose, irrevocable merely because the power of revocation was not exercisable immediately before April 22, 1936. It followed that each of the two annual payments of £750 must, to the extent of one half, be treated as income of Lord Glenconner.

Surtax—settlement—Finance Act, 1938, *s.* 38 (1).—*C. I. R.* v. *Hannay*, [1941] T. R. 89, raised a question as to the application of sub-section (1) of section 38 of the Finance Act, 1938, which deals with revocable covenants for annual payments. H. and his wife had transferred property to a company controlled by themselves, and the wife had covenanted to make certain annual payments during her life to the company or its assignees. In the light of the decision in *C. I. R.* v. *Morton* (see note above), it had to be conceded by the taxpayer that the formation of the

company, the transfer of the property, and the making of the covenant for the annual payments amounted to an "arrangement" constituting a "settlement" within the definition in section 41 (4) (b) of the 1938 Act. It had also to be conceded, in the light of *C. I. R.* v. *Morton*, above, and *C. I. R.* v. *Payne*, 19 A. T. C. 505 (see *The Conveyancer*, December, 1940, at p. 155), that X and his wife, by virtue of their control of the company, had power to determine a provision of the settlement so as to satisfy, to that extent, the requirements of section 38 (1). But could it be said that, in the event of the exercise of that power, the settlor's wife would or might cease to be liable to make the annual payments within the meaning of the sub-section? The Court of Session decided that it could not. The covenant was a covenant to pay the annual sums to the company or its assignees. The wife's obligations would not, therefore, be determined by the winding-up of the company, and though she would stand to benefit, as a shareholder, by the sale of the right to receive the annual payments, the fact remained that she would not cease to be liable to make the payments, with the result (it was held) that section 38 (1) did not apply.

Tax-free annuity—whether free of foreign tax.—The will of X, who died domiciled in the United Kingdom, provided for the payment to his widow of an annuity "free of all taxes (including income tax) and duties". The widow remarried and went to live abroad, with the result that her income became liable to foreign income tax. Was she entitled, under the will, to receive the annuity free of foreign as well as United Kingdom tax? This was the question which arose in *Re Frazer*, 20 A. T. C. 73. An analogous question was considered in *Re Norbury*, [1939] Ch. 528, where a pecuniary legacy had been given "free of duty", and it was held that the words "free of duty" did not cover any duty which might be payable in respect of the legacy under the law of a foreign country. *Re Norbury* was distinguished in *Re Quirk*, [1941] 1 Ch. 46, and was held in *Re Frazer*, above, not to conclude the question which arose in that case. Nevertheless, looking at the will as a whole, Bennett, J., came to the conclusion that the testator could not, as a matter of construction, be supposed to have contemplated taxes or duties other than those imposed by the law of this country, and that the beneficiary was not, therefore, entitled to throw the burden of the foreign income tax upon the residuary estate.

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5. *DEATH DUTIES CASES.*

By LEONARD STEIN, Barrister-at-Law.

Estate duty—settlement of policy moneys—premiums paid by trustees out of moneys lent by settlor.—H. took out certain insurance policies on his own life. He subsequently assigned them to trustees for the benefit of his children. The Trust Deed provided that the children's interests should vest in them respectively at the date of the Deed, but that they should not be entitled to call upon the trustees to surrender or sell the policies. The trustees were, however, empowered, at their discretion, to assign or surrender the policies and to borrow money on the security thereof. At the time of the settlement the policies were not fully paid. Soon afterwards the premiums remaining due were paid by the trustees out of moneys borrowed by them from H. On his death, the debt so created, with interest thereon, was included in the assets of his estate. These were the material facts in *Lord Advocate* v. *Hamilton*, [1941] T. R. 73. It should be noted that the decision is a decision of the Outer House, and not the Inner House, of the Court of Session. On the death of H., the Crown claimed estate duty in respect of the proceeds of the policies under section 2 (1) (d) of the Finance Act, 1894, which provides that the property deemed to pass on a death shall include " any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising . . . on the death of the deceased ". Lord Keith decided against the Crown, rejecting its contentions at every point. In the first place, he held that the " interest " could not be said to have been purchased or provided by the deceased alone. The premiums were paid in part by the trustees, and it was immaterial that they were so paid out of moneys borrowed from the deceased. Nor could it, in Lord Keith's view, correctly be said that the purchase or provision was made by the deceased alone in the sense that the earlier premiums were paid by him personally and the remainder were paid by him through the medium of a trust which he had created. The trust was, indeed, brought into existence by the deceased, but the premiums paid after the assignment of the policies to the trustees were paid, not at the cost of the deceased, but at the cost of the trust. On this point the learned Judge distinguished *C. I. R.* v. *Scott's Trustees* (1918), S. C. 720, where, in addition to the life policies, other property had

also been assigned to the trustees, and it was out of that property that the premiums were paid by them.

The next question was whether the purchase or provision was made by the deceased " in concert or by arrangement with " the trustees. The learned Judge held that it was not. In so far as premiums were paid by the trustees, they were not, in fact, paid " by the deceased " either alone or " in concert or by arrangement with " any other person, and if the words " in concert or by arrangement with " had any application to the case, all that would follow would be that the payments in question were made by the trustees in concert or by arrangement with the deceased—a result which would not be of any assistance to the Crown. An alternative line of argument on the part of the Crown was that the interest could be regarded as having been purchased or provided by the deceased to an extent proportionate to the number of premiums paid before the assignment. The learned Judge, however, dismissed this suggestion, pointing out that there is nothing in section 2 (1) (d) analogous to the provisions of section 2 (1) (c), the effect of which is that where a policy on the life of the deceased was partially kept up by him for the benefit of a donee, estate duty is chargeable in respect of a proportion of the policy moneys corresponding to the proportion of the premiums paid by the deceased. Turning to another aspect of the case, Lord Keith further expressed the view that the Crown's claim must in any case fail for the reason that there was here no room for the accruing or arising of a beneficial interest on the death of the deceased. The Trust Deed provided that the beneficiaries' interests should vest in them respectively " at the date hereof ", and the death of the deceased neither caused an interest to arise or accrue nor rendered indefeasible an interest which till then was defeasible, but merely fixed the date of payment. This appears to be consistent with the principle of the decision in *Adamson* v. *Att.-Gen.*, [1933] A. C. 257, though it is difficult to reconcile with certain observations by Palles, C.B., in the well-known case of *Att.-Gen.* v. *Robinson*, [1901] 2 I. R. 67. As to section 28 of the Finance Act, 1934, it was pointed out by Lord Keith that this section is only concerned with the quantifying of a beneficial interest which arises or accrues on the death of the deceased by eliminating the consideration of any pre-existing interest in expectancy, and that it has of itself no bearing on any question which may arise as to whether such an interest did or did not arise or accrue on the death.

6. *RATING CASES.*

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law.

[*Note.*—Under this heading only occasional rating decisions are noted which are of special interest to readers of *The Conveyancer.*]

Proposal for amendment of the valuation list. — Under section 37 (1) of the Rating and Valuation Act, 1937, any person who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force may make a proposal for the amendment of the list. *Barratt* v. *Gravesend Assessment Committee* (1941), 57 T. L. R. 590, raises several important points in connection with this provision.

In the first place, the grievance need not have existed on April 1 preceding the proposal; the grievance may relate back to the whole time since the beginning of the current valuation list, or it may relate to some matter which has arisen subsequently so that the valuation is too high at the date of his proposal.

Furthermore, it is to be noted that either the ratepayer or the rating authority may be aggrieved and make the proposal for amendment.

Finally, when a proposal for amendment has been made the assessment committee may properly have regard to the fact that the hereditament, in view of its situation, has been adversely affected by the outbreak of war; and in determining the value to be assigned to the premises the duty of the committee is to consider this as well as all other relevant matters and to determine what rent a hypothetical tenant might reasonably have been expected to pay for a tenancy of the premises on the statutory terms beginning on the date of the proposal.